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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 262.

CHRISTOPHER OSCANYAN, PLAINTIFF IN ERROR,

vs.

THE WINCHESTER REPEATING ARMS COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 12, 1878.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Christopher Oscanyan, plaintiff in error, and The Winchester Repeating Arms Company, defendant in error, a manifest error hath happened, to the great damage of the said Christopher Oscanyan, plaintiff in error, as is said, and as appears by complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this second day of May, in the year of our Lord one thousand eight hundred and seventy-eight and of the Independence of the United States the one hundred and second.

[SEAL.] JOHN I. DAVENPORT,
Clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit.

Allowed.—W. G. C.

2 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John I. Davenport, clerk of the circuit court of the United States for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to eighty-five, inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of Christopher Oscanyan, plaintiff in error, against the Winchester Repeating Arms Company, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 14th day of August, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the said United States the one hundred and third.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

(Indorsed:) U. S. circuit court. Christopher Oscanyan v. The Winchester Repeating Arms Company. Writ of error. Hermon H. Shook, pl'ff's att'y, 82 Nassau st., N. Y.

Service of a copy of within writ of error hereby admitted this 21st day of June, 1878.

ROBINSON & SCRIBNER,
Att'ys for Def't.

U. S. circuit court.

JOHN I. DAVENPORT, *Clerk.*

JUNE 20, 1880.

3 United States circuit court for the southern district of New York.

Pleas before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings, in the city of New York, of the term of October, in the year of our Lord one thousand eight hundred and seventy four.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States.

JOHN I. DAVENPORT, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that on the 27th day of July, in the year 1874, a suit was commenced in the supreme court of the State of New York, wherein Christopher Oscanyan was plaintiff and the Winchester Repeating Arms Company was defendant, by the service of a summons and complaint thereon on said defendant, and that thereafter and on the 12th day of August, 1874, such proceedings were duly had in said State court that said suit was by the order of said supreme court
4 of the State of New York, duly made and entered on said last named day, removed to this court, and that thereafter and on the first day of October term, 1874, to wit, on the 19th day of October, in the year 1874, under and pursuant to the statute in such case made and provided, a copy of the process in said suit, duly certified by the clerk of said State court, was duly filed in the office of the clerk of this court, which copy process is in the words and figures following, to wit:

Summons for a money demand on contract.

Supreme court, city and county of New York.

CHRISTOPHER OSCANYAN, PLAINTIFF,
against
WINCHESTER REPEATING ARMS COMPANY, DEFENDANT.

To the defendant above named:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to
5 serve a copy of your answer to the said complaint on the subscriber at his office, No. 102 Broadway, New York City, New York, within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will take judgment against you for the sum of one hundred and forty-four thousand & ninety-five & $\frac{50}{100}$ dollars, with interest thereon from the eighteenth day of June,

one thousand eight hundred and seventy-two, besides the costs of this action.

Dated New York, July 23rd, 1874.

WILLIAM BARNEY,
Plaintiff's Attorney.

That thereupon, and on said 19th day of October, 1874, under and pursuant to the statute in such case made and provided, a rule was duly entered in this cause by which it was ordered that this cause do proceed in this court as if the same had been brought into this court by original process therein, and that the appearance of the defendants, The Winchester Repeating Arms Company, by their attorneys, Sanford, Robinson & Woodruff, be entered therein.

6 That thereafter, to wit, on the 31st day of October, 1874, in October term in the year 1874, before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings in the city of New York, came Christopher Oscanyan, by William Barney, esq., his attorney, and brought into the said court, before the aforesaid judges thereof then there, his certain declaration against The Winchester Repeating Arms Company, being in custody, &c., of a plea of trespass on the case upon promises, which said declaration follows in these words, that is to say:

THE UNITED STATES OF AMERICA:

Circuit court of the United States for the southern district of New York, of the October term, of the thirty-first day of October in the year 1874.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Christopher Oscanyan, plaintiff in this suit, comes here into court, and by William Barney, his attorney, suggests and gives the court now here to understand and be informed that heretofore, to wit, on

7 the 27th day of July last past, an action was commenced in the supreme court of the State of New York, in the city & county of New York, according to the laws of the State of New York, and the rules and practice of said court in such case made and provided, in favor and in the name of the plaintiff who was and is now a citizen of the United States and a resident of the State of New York, against the defendant herein, the "Winchester Repeating Arms Company," a corporation duly incorporated under the laws of the State of Connecticut, under the name of the "Winchester Repeating Arms Company," for the purpose of making and vending arms, guns, repeating arms, appurtenances thereto, ammunition, and for other purposes, upon and for the same cause of action hereinafter set forth.

That the defendant afterwards by Sanford, Robinson & Woodruff, esquires, its attorneys, duly appeared in said action, and such proceedings were thereupon had that on the 13th day of August, 1874, the said action was in due form of law removed for further prosecution and trial into this court, according to the act of Congress in such case made and provided.

8 Wherefore, let the further proceedings and trial in this action against the defendant be continued in this court. And the plaintiff accordingly, by William Barney, his attorney, complains of the

defendant in this suit, being in custody, &c., of a plea of trespass on the case for promises.

For that whereas the said defendant, heretofore, to wit, on the 18th day of June, 1872, at the city of New York, in the district aforesaid, was indebted to the said plaintiff in the sum of $144,095.50 dollars lawful money of the United States of America, for the work & labor, care and diligence of the said plaintiff by the said plaintiff before that time done and performed and bestowed in and about the business of the said defendant and for the said defendant and at his special instance and request as follows. to wit, the said plaintiff avers.

That during the months of February and March, 1870, the government of the Turkish or Ottoman Empire was and had been previously thereto, desirous to make large purchases of improved arms, guns, ammunition & military equipments & appurtenances, & for that pupose had authorized and directed one Rustem Bey to select such arms,
9 guns, ammunition & military equipments.

And said government sent said Rustem Bey to the United States for such said purpose. That said Rustem Bey was a Turk, unacquainted with the English language. That the plaintiff is of Tur ish birth, and familiar with the Turkish language, and likewise familiar with the English language. That said Rustem Bey also had confidence in the plaintiff's knowledge & experience and knowledge of men and things in this country, which was known to defendant.

That on or about the month of July or August, 1869, Oliver F. Winchester, president of the defendant, was introduced to the plaintiff, in the city of New York, without the plaintiff's solicitation, and informed plaintiff then and there that he was acquainted with the fact of said mission of said Rustem Bey, and the desires aforesaid of said Turkish government, and urged plaintiff to present to the notice of said Rustem Bey the defendant's said arms & appurtenances thereto for trial and inspection to the end that the same might be adopted by & sold to said Turkish Government by defendant, requesting plaintiff to interest himself as agent for defendant in the matter, and sending specimens
10 of said arms and appurtenances thereto to plaintiff to be submitted by said plaintiff to said Rustem Bey & said Turkish Government for the end and purposes aforesaid. That thereafter said defendant, by Oliver F. Winchester, its president and agent, thereto duly authorized by said defendant, on or about March 4th, 1870, in consideration of the premises and of the efforts & services rendered & to be rendered by plaintiff in assisting in bringing the arms, guns & ammunition of the defendant to the attention of said Turkish Government, and inducing said government to make purchases thereof from defendant, promised and agreed in writing to pay this plaintiff therefor a commission of ten per centum upon the amount of all sales of such arms, guns & ammunition that should be made to or by plaintiff to said Ottoman or Turkish Government, and sent to plaintiff at the same time specimens of said arms, guns & appurtenances. & thereafter specimens of said ammunition for said arms, to be by plaintiff submitted for inspection, trial, and approval to said Rustem Bey, & to be forwarded or caused to be forwarded to said Turkish Government.

That thereupon plaintiff, as agent of said defendant, submitted
11 the said arms, guns, ammunition & appurtenances thereto, at the same time disclosing said agency to Rustem Bey aforesaid, who examined & approved of said arms & ammunition & appurtenances thereto, & caused the same to be forwarded to the proper officer or officers of said Turkish Government.

That said arms, guns & ammunition & appurtenances were so examined and approved by said Turkish Government, who thereafter ordered large quantities thereof from defendant, and defendant sold & delivered large quantities thereof to said government, namely, on or about the 9th day of November, 1870, to the amount of $534,975 00 & on or about the 19th day of August, 1871, to the amount of $846,000.00, and received payment therefor.

That said sales were so made by defendant, by and through the aid, assistance and efforts of plaintiff in bringing the defendant and its said arms, guns, and ammunition into communication with said Rustem Bey and with the Turkish Government aforesaid, and causing and promising said arms, guns, ammunition and appurtenances thereto to be brought to the notice, trial, inspection, and attention, and approval
12 of said Rustem Bey and said Turkish Government.

And being so indebted the said defendant in consideration thereof, afterwards, to wit, on the 13th day of June, 1872, at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money above mentioned, to wit, $144,095$\frac{50}{100}$ dollars, when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant (although afterwards requested so to do) has not as yet paid the said $144,095$\frac{50}{100}$ dollars above mentioned or any part thereof to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto altogether refused, and still does refuse, to the damage of the said plaintiff of two hundred thousand dollars, and therefore the said plaintiff brings suit, &c.

And the said The Winchester Repeating Arms Company, defendants in this suit, by Sanford, Robinson & Woodruff, their attorneys,
13 come and defend the wrong and injury, when, &c., and say that they did not undertake or promise, in manner and form, as the said plaintiff hath above thereof complained against them. And of this they put themselves upon the country. And the said plaintiff doth the like, &c.

That thereafter, and on the 13th day of November, 1877, a rule was duly entered in this cause, by which it was ordered that Robinson & Scribner be substituted in the place of Sanford, Robinson & Woodruff, as attorneys for the defendant herein.

That thereafter, and on the 11th day of December, 1877, a rule was duly entered in this cause, by which it was ordered that Herman H. Shook be substituted in the place and stead of William Barney, as attorney for the plaintiff herein.

Afterwards, that is to say, of the October term in the year 1877, to wit, on the 13th day of December, in the year 1877, before the honorable Nathaniel Shipman, district judge of the district of Connecticut, assigned to hold the circuit court of the United States of America
14 for the southern district of New York, according to the form of the statute in such case made and provided, come as well the above-named plaintiff as the above-named defendant, by their respective attorneys above mentioned, and the jurors of the jury summoned to try the said issue being called, also come, who, to speak the truth of the matters aforesaid, being chosen, tried and sworn, say, upon their oath, that the said defendant did not undertake or promise in manner and form as the said plaintiff hath above complained against him.

Therefore it is considred, that the said plaintiff take nothing by his

said declaration, but that he be in mercy, &c., and that the said defendant do go thereof without day, &c.

And it is further considered by the said court now here, that the said defendant do recover against the said plaintiff one hundred and fifty-three dollars and twelve cents, for his costs and charges by him about his defence in this behalf laid out and expended, by the said court now here adjudged to the said defendant, and with his assent, accord-
15 ing to the form of the statute in such case made and provided.

And that the said defendant have execution thereof, &c.

Judgment signed this 13th day of March, A. D. 1878.

J. M. DEUEL,
Dep. Clerk.

(Endorsed:) United States circuit court, southern district of New York. C. L. D. 4, p. 85. Christopher Oscanyan vs. The Winchester Repeating Arms Company. Judgment record. Robinson & Scribner, def'ts att'ys. Filed M'ch 13, 1878.

16 CHRISTOPHER OSCANYAN
v.
WINCHESTER REPEATING ARMS CO.

Decision upon motion of defendant to direct a verdict for the defendant, or to dismiss the suit upon the grounds that the facts which are conceded by the plaintiff in his opening statement to be true, show that, as matter of law, he has no cause of action.

SHIPMAN, *J.*

This is an action of assumpsit to recover from the defendant $136,000, the same being commissions which it is alleged the defendant agreed to pay to the plaintiff for his services in effecting the sale of fire-arms to the Turkish Government, amounting in all to $1,360,000.

The plaintiff's counsel, in his opening statement to the jury, has stated the facts upon which he relies, and which facts, it is conceded, the plaintiff offers to prove, and claims to be true. Assuming that such facts are true, the defendant moves, according to the practice in this circuit for a verdict for the defendant, or for a dismissal of the
17 suit, upon the ground that the plaintiff has no legal and valid cause of action upon his own showing.

The facts, which for the purpose of the decision, it is necessary to recite, are as follows:

The plaintiff is an Armenian-Turk, who has long resided in this country, and is a person of education, ability, and literary accomplishments. In the years 1869 and 1870, he was consul general for the Ottoman Government in the city of New York. The office had no fixed salary, but the incumbent had the right to receive certain fees for clearances of Turkish vessels, or vessels bound for Turkey. The duties of the office are not stated, except so far as can be inferred from the title. It is certain, however, that the plaintiff was in some sort the representative of the Turkish Government in this city, and was an acknowledged official of that empire. In 1869, the Turkish Government sent Rustum Bey to this country to purchase arms and ammunition, or to examine various arms, and to report upon and recommend those which he should approve, to the proper authorities in Turkey.

Rustum Bey did not speak the English language, but was ac-
18 quainted with French. He was an old acquaintance of the plaintiff, and while in this city made the plaintiff's office his head-

quarters. As the plaintiff was well versed in the English language, all the business pertaining to the selection of arms was transacted by Rustum Bey through the plaintiff.

The defendant was and is a corporation established in Connecticut for the manufacture of fire-arms, of which corporation Mr. O. F. Winchester was at the time of these transactions the president.

In 1870, the plaintiff and Mr. Winchester met each other at the store of Schuyler, Hartly and Graham, when Mr. Winchester sought an introduction to the plaintiff through one of the members of that firm, and asked the plaintiff to call Rustum Bey's attention to the defendant's repeating rifle. The plaintiff replied that he had a commission on all business or sales which were effected through his instrumentality. Winchester replied, "We will make that right and agree upon the amount," or words to that effect.

19 The weapon was exhibited by Mr. Oscanyan to Rustum Bey, who did not like it. The plaintiff afterwards informed Mr. Winchester of this fact, but said that he thought he could induce Rustum Bey to include the Winchester arm among other samples which he was to forward to Turkey. This was done.

In January 1, 1870, Rustum Bey received instructions from the Sultan to examine and report upon the Spencer rifle, an arm which had been manufactured in this country. The reason for giving this order was that the Sultan had heard that a quantity of these guns were owned by and were to be sold by the United States Government.

The plaintiff thereupon used all his influence (which is represented to have been great) with Rustum Bey to have the Spencer gun discarded, and also used all his influence to have Rustum Bey examine the Winchester gun. The Turkish officer still did not like the arm, but finally the plaintiff succeeded in obtaining from him an order for 1,000 guns. This order Rustum Bey gave in order to please the plaintiff, who he knew was getting a commission, and furthermore in his report condemned the Spencer gun.

20 Mr. Winchester and the plaintiff subsequently met, and Mr. Winchester was informed that the plaintiff had succeeded in getting the Spencer gun to be condemned, to which Winchester replied, "Why did you do that? I could have furnished you commissions upon sale of that gun." The plaintiff replied, "Why, the Turkish Government would have bought of the U. S. Government."

The Turkish Government thereafter invited proposals for the sale of 20,000 Winchester rifles, and ordered fresh samples. Mr. Winchester was informed by the plaintiff of this direction, and that he had got an order for 20,000 guns, and could get an order for 100,000 more.

In this conversation Winchester was also informed of an objection which the Turkish Government made to the spring of the magazine, and was urged to meet and overcome the objection. At the same interview the plaintiff asked Winchester to put their agreement in regard to commissions in writing, which was done.

The agreement, which was dated March 4th, 1870, is in the following words:

21 Subsequently Mr. Winchester informed the plaintiff how the objection in regard to the spring could be avoided, and that it was in fact without foundation.

On March 5th, 1870 (Rustum Bey having forwarded his report to the Turkish Government), a fresh box of samples was sent to Halil Pasha, the Turkish minister of ordnance, at Constantinople. This box

arrived at Constantinople April 18th, 1870, and was taken to the palace of the Sultan, who issued his order that 20,000 guns should be purchased, subject to trial of the samples.

Halil Pasha received the order, and informed the Sultan that no trial could be made, as no cartridges had been sent. These had not been shipped on account of a statute of the United States which prohibited shipping ammunition on ocean steamers. This information was returned to this country, and Winchester endeavored to overcome the difficulty by telegraphing that he would send cartridges from Berne, Switzerland, where he had a factory or depot of supplies.

The cartridges were not in fact sent. Rustum Bey became excited, as he had condemned the Spencer gun through the plaintiff's
22 influence, and he feared a reprimand from the Turkish Government. The plaintiff endeavored to appease him, and went to Winchester, who then said there were no cartridges in Berne. The plaintiff returned to Rustum Bey, who is now enraged, and says that he never liked Winchester's looks, but is mollified by Oscanyan. Finally it was agreed, at the plaintiff's suggestion, that cartridges should be sent to Turkey in a sailing-vessel. They were furnished by the defendant and were so sent. The trial was had in Constantinople on July 3rd, 1870, with a favorable result.

Many facts were stated in regard to an attempted revocation by the defendant of the contract with the plaintiff, and the attempts of a Boston firm to make sales of the defendant's arm to the Turkish Government, and to obtain commissions from the defendant, all which are unimportant in the aspect of the case which is presented by this motion.

On November 9th, 1870, a written contract was entered into by the defendant with the Turkish Government for arms to the amount of $520,000, and on August 19th, 1871, another contract was entered
23 into for the purchase of arms from the defendant to the amount of $840,000.

The plaintiff claims that the procuring cause of these contracts was the recommendation of Rustum Bey, which recommendation was obtained from him through the influence of the plaintiff.

The defendant's counsel now moves for a verdict, upon the ground that the alleged contract with the plaintiff for the payment of commissions to him upon sales made to the government of which he was an officer and trusted advisor by the exercise and through the means of his great influence with the purchasing agent of that government is void, as being a contract which is corrupt in itself, and which is prohibited by morality and public policy.

The character of the services which the plaintiff rendered, and the source or cause of this efficiency in obtaining for this arm the favor of Rustum Bey and the large orders of the Turkish Government has been so boldly and clearly stated by the plaintiff's counsel, that the case is freed from all disguise. The contract between the plaintiff and the defendant was a purchase and sale of the plaintiff's official influ-
24 ence as an officer of the Turkish Government, and as the manager of the business transactions of Rustum Bey with American manufacturers, and the purchase and sale of the personal influence of the plaintiff over Rustum Bey, who was a stranger to our language and upon our soil, and the transaction was an active and controlling exercise of this influence for the benefit of the defendant in causing the rejection of arms, the purchase of which it was supposed would not enure to the defendant's benefit, and in causing the purchase of the defendant's arms by the Turkish Government.

The plaintiff states, through his counsel, that he caused the rejection of the Spencer rifle, which the sultan was disposed to look upon with favor, because the plaintiff supposed that the purchase of this arm would be of no pecuniary benefit to the defendant, and that he caused the purchase of the Winchester rifle to an immense amount, because he was thereby hoping to earn large commissions, and because such a purchase would enure greatly to the benefit of the defendant. The benefits which would inure to the government of which he was the com-
25 mercial representative in this city, do not seem to have entered into the considerations which influenced his mind.

It is true that the plaintiff was not the purchasing agent of the Turkish Government, but he was its agent, and one upon whom the purchasing agent relied. He was a public officer of the Government of Turkey. In delivering the opinion of the Supreme Court in Triot v. Child, 21 Wall., 441, Mr. Justice Swayne remarks: "The theory of our government is that all public stations are trusts, and that those clothed with them are to be animated solely by considerations of rights, justice and the public good. They are never to descend to a lower plane." I am not aware that Turkey has laid down any different rule for the guidance of the persons whom it has charged with the exercise of public trusts upon foreign soil.

It is virtually conceded that if such a contract had been entered into by an official of the United States, in regard to commissions upon the sale of supplies which might be effected through his influence or exertions with our own government, whether that official was
26 the purchasing agent or not, such a contract would be against public policy. The concession of the counsel is also found in the opinion in Tool Company v. Norris, 2 Wall., 45, in which Mr. Justice Field says: "All arguments for pecuniary considerations to control the business operations of the government * * * * are void, as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of this country." But it is said that this is the law to be observed by public officers in this country, and to be administered by the courts of this country, and it does not follow that it is a rule which is to be enforced by our courts upon foreign officers in regard to their dealings with foreign governments. The principle to which I have adverted in regard to contracts, for the case of official influence is not found in a local statute; it is not peculiar to the country; it is a principle of morality and of public policy enforced in all countries which have a thoroughly organized sys-
27 tem of law; and there is no presumption that it is contrary to the law of Turkey.

Again, the contract was entered into in this city, by a resident of this city with a citizen of Connecticut. "Matters bearing upon the execution, the interpretation and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance." (Scudder vs. Union National Bank, 1 Otto., 406.) Furthermore it is sought to be enforced in our courts. Not only is it true that such a contract is against public policy, but its enforcement by a court of justice is against public policy. Quoting again from the opinion of Mr. Justice Swayne, in Triot v. Child, "It is a rule of the common law of universal application that when a contract, express or implied, is tainted with either of the vices last named" (i. e., because it is contrary to a

constitution or statute, is inconsistant with sound policy or good morals) "as to the consideration, or thing to be done, no alleged right founded upon it, can be enforced in a court of justice."

28 It is not material that the plaintiff was permitted to enter into mercantile business by his government, nor is it material that his office was not a salaried one, nor that Rustum Bey was aware that the plaintiff was acting in the expectation of commissions. Rustum Bey was not authorized to condone any acts of the plaintiff. Neither do I think it important that the Turkish Government was aware that the plaintiff was in the receipt of commissions, for, as has been said, the courts of this country are not organized to enforce contracts which are repugnant to the principle upon which courts are founded.

It is strongly urged by the plaintiff that since the passage of the act known as the Practice Act, approved June 1st, 1872 (17 Stat. at Large, page 197), and embodied in section 914, 915 & 916, of the Revised Statutes of the United States, the pleadings in civil causes in the circuit and district courts, must conform as near as may be to the pleadings existing at the time in like causes in the courts of record of the State within which such circuit or district court is held, and that by the

29 code of procedure of the State of New York, the answer must set out specifically the grounds of defence which are relied upon, and that illegality of consideration must be specially set forth, and that the alleged invalidity of this contract is exclusively a matter of defence, and if neglected or waived by the defendant, is not to be regarded by this court. The plea in this case, being the general issue, was filed at the October term, 1874.

Prior to the act of June 1st, 1872, the common law system of process and pleadings existed in this court, and immediately thereafter, as a matter of fact, the system was not substantially and materially changed. Common law declarations were filed, and if no objection was made thereto, the pleadings thereafter were conducted under the established common law rules. No authoritative decision was rendered, discountenancing such system of pleading, until the case of Lewis v. Gould, decided in December, in 1875.

The present case was originally brought to a State court, and

30 was commenced by complant. After it was removed to this court, a new declaration in assumpsit was filed in accordance with the existing usage, and the plea of the general issue was also filed. In the case of Lewis v. Gould, (13 Blatchf. C. C. R., 216,) it was held that "the common law forms of pleading are no longer necessary in the United States courts within the State of New York, nor are they admissible except as they may be deemed to be substantially in compliance with the requirements of the code of procedure of the State as to pleadings." And in Bills v. R. R. Co., (13 Blatchf. C. C. R., 227,) it was also held that when a complaint had been put in in the State court, and the action had been removed to this court, no further pleading on the part of the plaintiff was necessary.

At common law, prior to the new English rules passed about the year 1833, the defendant could, under the general issue in an action of assumpsit, safely rely upon the defense that the contract which was sued upon was *alleged* in its inception. (1 Chitty on Pleading, 476, 477; Gould's Pleading, 330, 332; Stephen on Pleading, 162, note;

31 Young v. Black, 7 Cranch, 565; Craig v. Missouri, 4 Pet., 410; Andrews v. Pond, 13 Pet., 65; Wilt v. Ogden, 13 Johns., 56: Edson v. Weston, 7 Cow., 278; Young v. Rummell, 2 Hill, 278.) If, under the decision of Lewis v. Gould, it should now be held that the general

issue was inadmissible, or, if admissible, it did not permit the special matter of defence which is relied upon, yet the defendant having pleaded without objection under a system which was recognized as proper at the time when the plea was filed, should have the right to amend his plea, so as to have the benefit of a defence which goes to the merits, and is not merely technical in its character.

But the question in regard to the disposition of this case does not depend upon rules of pleading. The plaintiff in his opening statement stated the facts, which he claimed to be true, and upon which he should rely. It is not suggested that they were not stated truthfully. Those facts satisfy me that the contract was contra bona mores. Such an objection it is not possible for the defendant to waive. If he undertakes to waive or to disregard it, the duty of the court is still imperative not to enforce a contract which the law regards as injurious to public morals and against public policy. Courts are not open for the enforcement of such contracts, and will not lend assistance for the recovery of claims founded thereon, and it is immaterial whether the defendant has or has not formally taken the objection. The defence is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, ex dolo malo non oritur actio, is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation. (Coppell v. Hall, 7 Wall., 542.)

32

Recurring now to the character of the contract, there is no conflict in regard to the important facts. Upon a given and ascertained state of facts, the validity or invalidity of a contract is a question of law. There is nothing for the jury to pass upon. Upon the validity of this contract I do not think that there is a discrepancy between the law as expounded by the court of appeals of N. Y. or by the U. S. Supreme Court. The cases of Lyon v. Mittchell and Cummins v. Barculo are very far from validating such an agreement as is here sued upon.

33

In view of the decision in Jove C. v. Norris (2 Wall., 45) it is not important to ascertain what the precise duties of Mr. Oscanyan as consul general were. By virtue of his office and by virtue of his position as an officer of the Turkish Government here, and through his acquaintance with Rustum Bey, the plaintiff held close and confidential relations with that gentleman. He had an influence over him and was trusted and esteemed by him.

The plaintiff is now seeking to obtain payment for the exercise of his influence over a purchasing agent, which resulted in procuring a contract to furnish supplies to the government of which both were officers at the time of such contract. An agreement to pay for such services being void, the plaintiff has no cause of action, and the motion of the defendant is granted.

34

(Endorsed:) U. S. circuit court. Filed Jul. 16, 1878. John I. Davenport, clerk.

35 *Bill of exceptions.*

U. S. circuit court, southern district of New York.

CHRISTOPHER OSCANYAN
vs.
THE WINCHESTER REPEATING ARMS COMPANY.

Be it remembered that on the thirteenth day of December, 1877, at a circuit court of the United States for the second circuit, held on that day before the honorable Nathaniel Shipman, assigned to hold said circuit, the issues in this case came on to be tried; and a jury was duly called, impaneled and sworn to try the said issues. Thereupon the counsel for the plaintiff, Herman H. Shook, esq., stated the issues arising upon the pleadings, and also the facts which he claimed to be true, and which were proposed to be proved by him in support of the issue on his part, to the court and jury as follows:

May it please the court and you, gentlemen of the jury: The plaintiff in this case is Christopher Oscanyan, an American Turk. The
36 defendant is the Winchester Repeating Arms Company, a corporation organized under the laws of the State of Connecticut. The action is brought to recover $200,000 broker's commissions on sales made by the defendant to the Turkish Government through the instrumentality and agency of the plaintiff.

The plaintiff is an American Turk, but he is not a Mohammedan, but a Christian by faith.

In 1834, at the early age of sixteen, Oscanyan, being thirsty for knowledge and learning, left his Oriental home, and sailed for our own shores. On his arriving here he immediately entered the New York University, situated in Washington Square, in this city, from which institute of learning he graduated with high honor. All of his tastes, feelings and sentiments being with Christians, not with Mohammedans (for perhaps you are familiar with the fact that most of the American Turks are Christians), he married a daughter of an eminent divine. Subsequently, in order to extend his knowledge and improve his mind, he visits his native land, and there, in order that the authorities might show
37 their great respect for him, he was made the purveyor to the Sultana, and succeeded or rather was appointed to prepare her dowry. He was also associated with a personage known as Rustem Bey, and another known as Halil Pacha, both of whom will figure largely in this case so far as their names and fame are concerned. And I ask you to retain that fact in your mind, because I shall have occasion to refer to it again. Well, shortly after that he returned again to this country and he became very widely known throughout the entire length and breadth of our country by his lectures on Oriental customs. There is hardly a town or village in this country which is not familiar with the name and face of Oscanyan. He is also the author of a work on the Sultana and his people, published, I think, in 1857, which had a very large sale, and Oscanyan is also an authority upon Oriental manners and customs, recognized as such by all the journals of this city, and all over the country, and he is frequently consulted by professional and scientific men in regard to Turkish customs.

Well, gentlemen, in regard to the defendant, I am not so familiar with its history. It is a corporation, and probably its president, who

38 is the main person in this conflict, like the corporation itself, judged by the facts which have come before me, is without any soul.

The next personage to whom you will be introduced is Rustem Bey. Well, gentlemen, in 1869, in the early part of that year, the war again began to loom up with significant importance.

The Turkish government hearing, as belligerents do hear, a murmer afar off, in order to prepare for that they send Rustem Bey to this country to examine and report in regard to the purchase of arms and machinery, and all the paraphernalia of war. That became noised abroad, and all the manufacturers of arms and ammunition throughout the country began at once to make preparations for his arrival, to recommend their various machinery, arms and ammunition. At that time and before the arrival of Rustem Bey, Oscanyan was the consul-general of Turkey in the city of New York. Now, probably you are aware, gentlemen, that there is a consul in New York at the present time, but probably you are not aware that the only consul general from Turkey
39 who ever held that position in this country is the plaintiff in this action. The office itself was an honorary one. There was no compensation from the Turkish Government. The only way in which Oscanyan earned his livelihood was by mercantile transactions and by receipts from clearances of the shipping, a custom which allows a great many consuls from other countries in this country to take the clearances as the perquisites of their office. In fact they are allowed to do it, as we shall show by documentary evidence. Well, as I said to you, when the various manufacturers of arms and ammunition heard of the expected arrival of Rustem Bey, suspecting, in fact knowing, that his headquarters would be at the office of Oscanyan, they immediately commenced a correspondence with him, and he was waited upon by large numbers of these manufacturers in order to secure his influence in presenting the claims of their arms to Rustem Bey when he arrived. Well, Rustem Bey arrived in May, 1869, but he did not speak the English language; he was a Circassian by birth, and was a slave, I think,
40 of Fetki Pasha, but afterwards manumitted in consequence of the great ability and talent which he displayed. He was familiar with the French language, but not with the English; the plaintiff was familiar with both and consequently he had a great influence with Rustem Bey, and all of the transactions between the Turkish Government represented by Rustem Bey and the manufacturers were transacted through the plaintiff in this action; and all of those parties invariably, with the exception of the defendant in this action, have paid to Mr. Oscanyan all of the commissions to which he was entitled for his services; which commissions he was permitted and encouraged to take by the Turkish Government and by their authorized agents. Well, in June, 1869, the plaintiff and the president of the defendant met for the first time. That meeting took place in the warerooms of the firm of Schuyler, Hartley and Graham, in Maiden lane, also manufacturers of arms and ammunition. The plaintiff and Rustem Bey were in these warerooms looking at arms. The president of the defendant was also there and had in his hands one of his own rifles which he was handling
41 in a somewhat excited manner, probably intending to attract the attention of Oscanyan and Rustem Bey. Finally he sought an introduction to Oscanyan through one of the members of the firm of Schuyler, Hartley & Graham. The introduction took place. Said Mr. Winchester then to Oscanyan, "Wil you be kind enough to call the attention of Rustem Bey to my repeating rifle?" "Well," said Oscanyan, "Mr. Winches-

ter, I am receiving commissions from all parties for that favor, and I expect commissions for my services, and that is one of the ways by which I make my livelihood; if you can compensate me, if you can remunerate me by giving me commissions, I will use my influence for you, and do all I can for you." "Very well," said Mr. Winchester, "that is all right. You shall have whatever commissions we deem proper, and we will talk the matter over and agree upon that." Accordingly Oscanyan showed the Winchester repeating rifle to Rustem Bey. Rustem Bey was not pleased with it, but returned it without any comment whatever. But in a subsequent conversation between Oscanyan and Winchester,
42 the subject of the rifle was introduced, and Winchester asked Oscanyan with what success he had met in presenting the claims of the Winchester rifle. "Well," said Oscanyan, "I have done nothing so far, except merely to present it, and Rustem Bey is not favorably impressed with it, but I think I can succeed in getting him to put it in with other samples which are to be shipped to the Turkish Government." Oscanyan succeeded in doing that, and in November of 1869, the Winchester rifle, or samples of the Winchester rifle and carbine, and some other incidental apparatus, were put into cases with other samples and shipped to Constantinople. On the 7th of January, 1870, Rustem Bey received instructions from Halil Pacha—I suppose you all know something about Turkish titles, but perhaps do not all know that pachas are personages of great importance in the Ottoman Empire; they rank very much the same as a lord or a baron would in England. A bey is somewhat lower down in the rank of titular honor. Halil Pacha was the minister of ordnance of the Turkish Government. Fetki Pacha was the minister of war, what would be our Secretary of War at Washington.
43 Halil Pacha was subordinate to him, the minister of ordnance, and the duty devolved upon him of issuing orders which he received from the sultan in procuring arms and ammunition, and all of the various apparatus necessary in conducting the war. I might remark here incidentally in passing, that the custom in Turkey in regard to the orders of his highness is something like this: They have several kinds of edicts. The only one with which we shall have anything to do in this case is that called an irade. An irade is a secret edict or imperial ordinance that is at one stage of its issuance verbal and at another stage written. When the sultan desires to make known his pleasure to his subordinates, he first informs one of his, what we would call aid-de-camp, or as they call it there a chamberlain—he says to the chamberlain: "It is my pleasure that so and so should be done." The chamberlain then conveys that verbal irade from the sultan to the proper officer; we will suppose that it is the minister of war; the chamberlain takes that to him and says to the minister of war, "It is the pleasure of his high-
44 ness that you should purchase 20,000 guns," or it may be to the minister of ordnance, as it was in this case. Down to that time this irade is verbal, for the reason that it is not allowed to go upon the records in a written form, because it is a secret and known only to those connected with the government or with the department.

It does not take on the form of writing, until, in the cases of contracts, the contract has all been agreed upon, the terms fixed, nothing to be done but to put in writing; then a written irade is presented to the sultan, and he takes a long reed, makes a flourish and the transaction is ended. Well, now Halil Pacha was minister of ordnance, was the officer to communicate to Rustum Bey, his subordinate. In January of 1870, Rustum Bey received instructions from Halil Pacha to examine and report on a Spencer gun, which, although not the one which was

finally sold to the Turkish Government by the defendants in this case, yet was a gun manufactured or in some way dealt in by the defendant.

The reason why Rustum Bey was requested to examine that gun
45 was that the Ottoman Government had heard that the Government of the United States had on hand a large number of those guns, which they desired to dispose of in some way or other. Well, the fact of the instructions of Halil Pacha to Rustem Bey becoming known to Oscanyan, Oscanyan having agreed with Winchester to press the claims of the Winchester repeater, at once proceeded to use his influence with Rustum Bey to get Rustum Bey to condemn the Spencer gun; he raised all manner of objections that he could, and he finally did succeed in inducing Rustum Bey to put aside the Spencer rifle. Then he brought out a Winchester gun, a sample of which he always kept in his office for the very purpose whenever opportunity offered of presenting this claim to Rustum Bey; he brought it out that morning and presented its claims to Rustum Bey. Well, Rustum Bey never liked that gun from the very first that he had one presented to him in the office of Schuyler, Hartley & Graham; he did not like them. For what reason does not appear, and

Oscanyan had to use all of his ingenuity and skill and perseverance
46 and patience in order to get Rustum Bey to look at it at all. But finally he succeeded in getting Rustum Bey to recommend the purchase of a thousand of those rifles for the use of the imperial body guard. The reason assigned for that was that the Winchester repeater was not a gun which could be used by the ordinary soldier, it was a complicated rifle. It had, if I recollect correctly (as I have stated, I have to proceed cautiously in this case from very recent preparation), but I believe that I recollect correctly that there were two or three cartridges to fire off at the same time by this rifle, and it was a complicated one for an ordinary soldier to handle. For that reason Rustum Bey did, in order to please Oscanyan, with whom, as I told you very near the commencement of my opening, he had from his earliest years been on very intimate relations—Rustum Bey, I say, in order to please Oscanyan, knowing of the fact that Oscanyan had this arrangement with the defendant, that he should receive a commission on sales to the Turkish Government, thought he would go so far as to recommend the purchase of a thou-

sand for the use of the imperial body-guard, who were experienced
47 soldiers and veterans. Accordingly, Rustem Bey reports to the Turkish Government condemning the Spencer gun, and recommending the purchase of the Winchester repeating arms for the imperial body-guard. Shortly after that Oscanyan and the president of the defendant met, and the whole matter is again discussed. Oscanyan informs him of what he has done; that he has succeeded in getting Rustem Bey to condemn the Spencer gun, and to recommend a thousand of his for the use of the imperial body guard. "Well," said the president of the defendant, Mr. Winchester, "why did you do that? I would allow you commissions on Spencer guns as well as upon the repeater." "Well," said Oscanyan, "we cannot do that, for the reason the United States Government has a large number of those Spencer guns on hand. If Rustem Bey reports favorably for that gun, why, the Turkish Government will order directly from the United States Government. It is for that reason, that even if you could have furnished the guns, that was the reason which weighed in my mind in inducing Rustem Bey to condemn the Spencer gun."

On the 30th of February, 1870, Rustem Bey receives fresh in-
48 structions from Halil Pacha to inquire and report on the price of 20,000 repeating arms, and also asking for fresh samples. Oscan-

yan immediately telegraphed to New Haven to the defendant, and the following day Mr. Winchester comes down to the office of Oscanyan, where, as I have already told you, Rustum Bey usually made his headquarters. Almost all of the contracts were there consummated and drawn up upon the paper of Mr. Oscanyan. Immediately when Mr. Oscanyan met Winchester, he says to him, grasping him warmly by the hand, "I have got an order for 20,000, or an inquiry for the price of 20,000, and I think I can get an order for 100,000." Well, of course the president of the Winchester Repeating Arms Company was overjoyed, as who would not be? As I said before, Rustem Bey was disinclined to even look at his rifle, but through the agency—through the perseverance and skill, aye, and eloquence of Oscanyan, he had succeeded in getting an inquiry from the Turkish Government for an estimate upon 20,000 repeating arms. In this conversation Oscanyan calls the attention of Mr. Winchester to the fact that Rustem Bey had raised
49 a fresh objection to the Winchester rifle, an objection relating to the spring of the magazine. The objection was—if any of you have been in the armory you know more about this than I do; I shall have to take it from my memoranda—that if the spring of the magazine that presses the cartridges should get lost or broken, what could be done? That was the objection which Rustem Bey raised to this Winchester repeating rifle. Well, Oscanyan calls the attention of Winchester to that objection; and tells him in sending in his estimate to try and meet that objection. At that time, gentlemen, Mr. Oscanyan says to the defendant, "Now, I have the greatest respect for your honor and integrity, but perhaps it is better that we should have our agreement in writing." "Oh, very well," says Mr. Winchester, "it shall be in writing." Accordingly, the following day, Mr. Winchester calls at the office of Oscanyan, and there he hands to Oscanyan a written promise, dated—

NEW HAVEN, CONN., *March* 4, 1870.

OSCANYAN, *Ottoman Consul Gen.:*

MY DEAR SIR: In accordance with my promise, I now proceed to put in writing the agreement or promise I made to you, namely: "I hereby promise to pay to you a commission of ten per cent. upon all sales
50 of arms of our company made to or by you to the Ottoman Government, provided only, that such sale is made at prices and upon terms that shall have our approbation, or be authoriedz by me.

I am very truly yours,

O. F. WINCHESTER,
Pres. W. R. Arms Co.

P. S.—The commission on the Spencer arms will be the same as on our arms.

Well, now, gentlemen, here we have a promise. First, we have had a verbal agreement; that verbal agreement is subsequently put in writing. What is the agreement? I should be guilty of an insult to your intelligence if I should attempt to put any construction upon it. The very first construction, and, in fact, the only construction which can be put upon that agreement is, that the defendant agreed to pay Mr. Oscanyan ten per cent. upon all sales made to the Turkish Government, whether made by him directly or indirectly.

The language of that contract is, "you shall have ten per cent. on all sales made to or by you to the Ottoman Government," and the conver-

sations previously had been that, whether those sales were made directly or indirectly, Mr. Oscanyan was to receive his commissions
51 all the same. But the defendant in this case proposes to fall back upon the defence, that the contract itself was not executed by Oscanyan, as agent; that, in point of fact, it was signed by a house in Constantinople by the name of Azarians, pere & fils. But those parties were merely the agents of the defendant in signing the contract; that was all they did in the matter; that was all they did in the entire transaction; and from the very time when the arms were presented to Rustum Bey down to the time when the trial, as we shall show, had taken place, and down to the time when the purchase was made, nobody had any influence whatever in inducing that sale, except the plaintiff in this case. But, inasmuch as the president of the defendant manufactures repeaters, he also repeats in his promise, I have learned from the other side that they are content that the commission shall be upon sales made to Oscanyan. Well, gentlemen, it would be an insult to your intelligence to say that any man who is the president of a wealthy, large, and influential corporation would not know any better than to use the words
52 "commissions" upon sales made to a party. If that had been the understanding and agreement and the intent of this contract, the language would have been "for all sales to you we will grant you a deduction of ten per cent." Well, now, gentlemen, pardon me if I briefly review the facts down to this time; because hereafter the facts in this case will assume, until you are familiar with all the facts, a somewhat complicated shape. You will remember that through the influence of Oscanyan the Winchester rifle is first brought to the attention of Rustum Bey, the authorized agent of the Turkish government for the purchase of this gun. You will remember, then, that Rustum Bey was disinclined to even look at it, or at best to examine it. You will remember then that Oscanyan succeeds in getting Rustum Bey to put in samples—to put in samples of the Winchester arms into cases with other samples that were to be sent to the Turkish government. You will remember then, gentlemen, that in January Rustum Bey receives instructions from Halil Pacha to report upon the Spencer gun; that then, through the influence of Oscanyan, Rustum Bey condemns the Spencer gun, and Oscanyan
53 succeeds in getting Rustum Bey to recommend the purchase of a thousand Winchester repeaters for the use of the Imperial Body Guard. You will recollect, then, that on February 30th of 1870 Rustum Bey receive' fresh instructions from Halil Pacha to get an estimate for 20,000 repeating arms. You will recollect, then, that the interview between Oscanyan and Winchester takes place. There are the facts which we will establish, and all of the circumstances and events which transpired in connection with this case down to the time when the promise, the written promise that is, was given to Oscanyan by the president of the defendant. On the 5th of March, by the way, you recollect that Oscanyan immediately on the arrival of Winchester, in answer to Oscanyan's telegram, that Oscanyan and Winchester had that conversation, and Oscanyan told Winchester of a new objection which had been raised by Rustum Bey to this Winchester repeater, namely, that if the spring of the magazine that presses the cartridges down should get lost or broken that would be an objection and the arm would be useless. In a letter on the 4th of March, the letter containing the prices for this estimate of 20,000 guns, Winchester answers this objection which
54 Oscanyan told him Rustum Bey had raised. He says, "The question is sometimes asked 'What could be done if the spring in the magazine that presses the cartridges down should get lost or

broken?' This would cause no trouble, as the gun will work just as well, though not quite so fast, without the spring as with it, and the magazine would hold two more cartridges without it. All that it is necessary to do is, when loading the gun to raise the muzzle a few inches and the cartridges will drop readily in the place in the carrier lock." That is the way he meets the objection which Rustum Bey raised, the information of which he had received through Oscanyan.

On the 5th of March, the next day, Rustum Bey sends back his report, with the estimate which had been furnished to him by the defendant through Oscanyan.

On the 5th of March, the next day after the written promise had been given to the plaintiff, a box containing fresh samples of the Winchester repeater was forwarded to Habil Pacha by Stoker's express. This box arrived in Constantinople on the 18th day of April, 1870, and it was then taken from the custom-house to the palace of the sul-
55 tan and the very next day the sultanissues his irade, his imperial ordinance, that it is his pleasure that 20,000 Winchester repeating arms should be purchased, subject to trial. That order was delivered by a chamberlain to Halil Pacha, the minister of ordnance and proper official to receive that instruction, or that irade. Halil Pacha, in company with others, immediately returns to the sultan; going towards the palace meets the sultan in the garden of the palace, and there he informs his highness that he has received the pleasure of his highness in respect to the guns, but that a trial cannot take place, because the cartridges—mark that, gentlemen—because the cartridges have not arrived with the samples. Now, the reason why these cartridges were not sent with the samples was because there is a law, or, at least, that was the impression which all of the parties to this transaction had, and I think they were correct; there was a law—a United States—prohibiting the shipment of ammunition on ocean steamers. Here was a difficulty. The samples had been sent there, and they could not be tested on account of the want of cartridges. Well,
56 Winchester endeavored to overcome this difficulty by telegraphing, or saying that he would telegraph to Berne, in Switzerland, (where, I believe, he had a branch factory, or some place where his cartridges were stored,) that he would telegraph to Berne to send on the cartridges from Berne to Constantinople. But Winchester did not; why, may appear in the course of this trial. In the meantime Rustum Bey becomes uneasy, angry, and excited; and he had just cause to be so excited and angry. He had condemned the Spencer gun, to which he was very favorably disposed; and through the influence of Oscanyan, he had recommended the Winchester gun; those samples had been sent without the cartridges; and without them the trial could not take place, and he feared that he might receive from the Turkish Government a sharp letter of rebuke fer his negligence. Well, Oscanyan tries to appease him, and succeeded in doing so. Then Oscanyan again goes to see Winchester. Then Winchester, with the coolness of a philosopher and the face of a saint, informs him that there are no cartridges in Berne; that he was mistaken. Well, gentlemen, why
57 did he wait till that time before he came to Oscanyan to inform him that he was mistaken about those cartridges? The question will be answered as we proceed with the trial of this cause. Well, Oscanyan again reports to Rustum Bey, and Rustum Bey is not excited, he is enraged, and he tells Oscanyan he never liked the appearance of that man, Winchester. Well, Oscanyan says to Rustum Bey, "Oh, my dear sir, you are sometimes deceived." Yes, so they were, both

ways. Rustum Bey thought the looks of Winchester were not favorable, and Oscanyan thought they were. They were both deceived. Well, Oscanyan is again put to his ingenuity, and he suggests that cartridges be sent by a sailing vessel. A sailing vessel was presently to sail from this port to Constantinople with other arms and machinery; that vessel was called the "Yarrington." That suggestion was made by Oscanyan to Rustum Bey. Rustum Bey, finding himself in a very unfortunate attitude towards his own government, readily acceded to the proposition. Then Oscanyan goes to Winchester, and finally succeeds in getting Winchester to give him some cartridges. Accordingly, on the 19th of June, these cartridges were shipped by the "Yar-
58 rington" to Halil Pacha, minister of ordnance, and they arrived at Constantinople in due time. Shortly after the arrival of those cartridges the trial took place in presence of all the proper officers, and the trial was a success, and the Turkish Government approved the rifle.

Now, gentlemen, if we prove the facts which I have already stated, we think we are entitled to a verdict at your hands. We have, through our efforts, through our perseverance, industry, ingenuity, and skill, succeeded in bringing the defendant into communication with the Turkish Government. We have done all that the law requires any broker to do—namely, to bring the contracting parties together; we have not only brought the contracting parties together, but, by our efforts, we have succeeded in inducing the Turkish Government, through its authorized agent, Rustum Bey, to recommend the purchase of a rifle which at first he was inclined to condemn.

Well, gentlemen, a month or two elapses. On the 15th of July, mark, gentlemen, the trial of the repeaters took place. On the 3rd day of July; that fact is testified to by one of the witnesses for the defendant, and although we were informed
59 that it took place at an earlier date, at the same time for our purpose it matters little. The cartridges arrived in Constantinople in June; shortly after the trial took place, whether it was the latter part of June or the fore part of July is a matter of little consequence; but the trial had taken place, the rifles had been brought to the attention of the Sultan, who had issued his imperial edict, his ira de for the purchase of those rifles subject to trial. That trial had taken place. The arms had been approved. What more was there for us to do? Were we by the terms of that contract to go to Constantinople to sign the contract between the defendant and the Turkish Government? No; and the defendant never thought that we were bound to do that. Gentlemen, on the 15th of July, thereby hanges the tale of this case, and thereby hangs the rope by which the defendant in this case will be executed.

"NEW HAVEN, CONN., *July 15th*, 1870.

"OSCANYAN,

"*Ottoman Consul General, 66 Broadway, New York:*

60 "MY DEAR SIR: The inclosed communication to you in your official capacity—

Gentlemen, here I am tempted to revert to a question asked by the court in regard to whether that promise was addressed to him in his official capacity. Well, almost all of the letters were addressed in that way. This is also addressed, but to show the animus of the defendant, who refers in this note to Oscanyan, although he addresses him in this note as the Ottoman consul-general, in this letter he refers

to another, which I shall read after finishing this, and which is part and parcel of the chicane characterizing the defendant through its president in this case from beginning to end, "The inclosed communication to you in your official capacity" explains itself.—"We are now so pressed for goods as to feel no desire to embark in foreign orders at present, and the prospects of standing orders are such that we do not wish to be in a position to be called upon to comply with promises made so long ago."

Well, now, what is the official document?

"NEW HAVEN, CONN., *July* 15, 1870.

"OSCANYAN,

"*Ottoman Consul-General, 66 Broadway, New York:*

61 "DEAR SIR: On the 4th of March last I had the honor of addressing you a communication in answer to your letter of the 2nd of that month. In that letter I submitted prices at which we would furnish to the Ottoman Government certain kinds and quantities of arms. It is now over four months since the date of that communication and I have received no answer to it. The natural conclusion is that if you have communicated the substance of that letter to your government, they have not found it their interest to entertain the subject. As, however, this may not be the case and they may still regard the terms then given as still binding upon us, I beg leave to say that since the date of that letter our business has largely increased"—

We shall presently show that it was through an intimation that they had received an order from the Turkish Government—

"and the present prospects are that the demand will be largely beyond our means of supply. Under these circumstances I feel it my duty to withdraw the offers then made. In doing so, I desire to say that my object is to free ourselves from any obligation implied or expressed in that letter, to the end that we may be free from any unexpected
62 call to comply with them and at a time when we shall be fully occupied, without saying, however, that we shall not be open to make any arrangement upon the basis of my letter of the 4th of March, if previous orders and contracts do not put it out of my power."

Now, gentlemen, Mr. Oscanyan replies, as all business men would do and ought to do—

"NEW YORK."—The very day on which he received the letter which I have just read:

"DEAR SIR: I have the honor to acknowledge the receipt of your favor of 15th instant, proposing to recall your offer to manufacture certain kind and quantities of arms at a certain price for the Ottoman Government, for reasons that 'more than four months have elapsed, and you have not yet received a definite reply thereto,' &c. With regard to the lapse of time, permit me to say that your specimen 'repeaters' though were duly and promptly forwarded by steamer via England to Constantinople, accompanied with the report of Col. Rustum Bey, yet the ammunitions not having gone with them, nothing could be done with the guns. This fact is well known to you. I am happy, however, to state that the case of ammunition which you last furnished and
63 which was forwarded by the Yarrington has reached its destination on the 30th ultimo. Consequently, the government is either engaged now with the trial of your guns or perhaps waiting the arrival of the colonel himself, who, having left here on the 2nd instant,

will shortly be there, and, no doubt, will do justice to the case in propria persona. Under these circumstances you will at once perceive that neither the colonel nor myself, nor even the government itself, are responsible for the delay, but that I am in hopes of being able to receive instructions thereon very soon. Besides, your withdrawal will naturally reflect unkindness or injustice both to the colonel and myself, who have interest' ourselves so much in your behalf, which I am sure you will be unwilling to assume.

"I am, with great respect, yours very respectfully,

"OSCANYAN."

Now, gentlemen, Oscanyan at that time had not heard anything about the trial. This man had; we knew that the Ottoman Government had determined to purchase those arms. That, gentlemen, accounts for the milk in this cocoanut.

64 Counsel then adverted to other points not pertinent to this bill and not claimed by the plaintiff to be pertinent.

After recess counsel resumed as follows:

Before proceeding with the particular point upon which we were dwelling when we took our recess, it may be well to recur briefly to the question of Oscanyan's official relations to the Turkish Government, because I have just been reminded that the counsel for the defendant in this case intends to rely upon a nonsuit. He intends, if he cannot whip us on the merits, he intends, if possible, to throw us out of court upon the technical point which he thinks to raise, that because Oscanyan was the Turkish consul-general, that therefore he had no right to enter into a contract with Winchester; that occupying an official relation with the Turkish Government, he was therefore prevented by law and custom from doing anything whatever for his own interests aside from his official duty. I think, if I recollect correctly, that I did say something about that before recess. I think I mentioned to you that although the Turkish Government had had a consul here, and that it has one now, yet that Mr. Oscanyan was the only person who has ever held the
65 office of consul-general. I think I also mentioned to you that that office was created here at this port as an honor to be conferred upon him, and that office has now been abolished, and no person has been appointed to succeed Oscanyan.

Now, gentlemen, we intend show that Mr. Oscanyan was not only not prohibited by the Turkish Government from engaging in mercantile enterprises while occupying the position of consul-general, but that, in point of fact, the Turkish Government gave him permission to do it, and encouraged him to do it, because there was no compensation received from the Turkish Government by the consul-general. It is an honorary office, as our board of aldermen used to be here before they found that they could make more out of an honorary office than they could out of a compensatory office. But we intend to show you, gentlemen, that during all the time that Mr. Oscanyan was consul-general of the Turkish Government at this port that he carried on other mercantile enterprises; that he lectures, and over all the country that he used his abilities, talents, and learn-
66 ing for the purpose of gaining a livelihood, because if he had relied upon the office of Turkish consul-general he would have starved. We shall show you that in evidence by an official document. He had a list of tariffs, the duty imposed upon those things which were

shipped. These tariffs, although they did not amount to very much, yet, such as they were, the Turkish Government allowed him to receive them as in some measure to make up for the non-allowance of a salary by the Turkish Government. I am informed that it is a very prevalent custom for foreign consuls at this and other ports to receive commissions from parties where they influence any transactions between parties and the government they represent not because of their official relation. To say that Mr. Oscanyan had no right to earn a livelihood, to enter into speculations for his own benefit and profit while he was consul-general of Turkey, would be to say that he could not do anything; that he must remain in his office whether he had any business to do or not, whether he received any compensation or not, and that he
67 has no right whatever to turn his hand to his own advantage in a single instance while he is in that office.

Another point is suggested to me by my associates, that Rustum Bey knew of the agreement between Oscanyan and Winchester; and mark you, in these particular transactions Oscanyan was not the agent of the Turkish Government, he was not sent here by the Turkish Government to purchase these arms; if it had been in the scope of his functions as the Turkish consul-general to purchase these arms, if it had been in the scope of his office, why would the Turkish Government have sent Rustum Bey here for the very purpose of examining and reporting upon these arms, and the very fact of his going to see the plaintiff, the very fact that Rust um Bey was sent here by the Turkish Government for the purpose of examining and reporting upon these arms, is evidence not only prima facie, not only presumptive, but conclusive evidence that Oscanyan had no relations with the Turkish Government with regard to the purchase of these arms. I beg you to keep in your minds that distinction and not to allow that to
68 prejudice you against us.

The learned counsel tells you that this letter was addressed to Oscanyan as the Turkish consul-general, and that therefore it was adrsssed to him, in his official capacity, and not as a private citizen. Well, gentlemen, you might just as well say that if I, going back to my office, desire to write a note to his honor and address him as Judge Shipman about a matter entirely disconnected with his office upon the bench, that therefore whatever transpired between us related to his official position. So in writng these communications to Oscanyan, Winchester addressed him as the consul-general, and the distinction which Winchester made shows that his mind is a very subtle one, You will notice that when he is going to write a letter relating to his official relations he addresses him as "Dear Sir." When he is writing a letter to him in reference to pri vate he always addresses him as "My Dear Sir."

The counsel, after recounting alleged evidence in reference to points not pertinent and not claimed by the plaintiff to be pertinent to
69 be pertinent to their bill of exceptions, further said:

On the 30th of August the Ottoman Government telegraphed to Winchester as to the price of those arms without commissions to anybody. In other words, the Ottoman Government wants to get around the commission; they want to have the benefit of the commissions which ought in justice to go to that party who in law would be what we call the procuring cause. Well, Winchester replies to that, and what does he do? Does he quote under prices? Not if he told my client the

truth. He told my client in his subsequent conversation that he quoted the same prices that he had quoted to the government or that he had given to Rustum Bey through Oscanyan upon the 4th of March, and we have given notice to the other side to produce that telegram and to produce a copy of the reply thereto; and if it is withheld you may make up your minds that it contains something that Winchester don't want you to know.

Well, on the 9th of November, 1870, a written contract was en-
70 tered into between the Winchester Repeating Arms Company and the Ottoman Government for 15,000 Winchester repeating muskets at $28.00, amounting to $420,000; 5,000 carbines at $20.00, $21,000—all $520,000; a little less than a year elapses, and on the 19th of August, 1871, a second contract is made for 30,000 repeating muskets at $28.00, $840,000. The two contracts amounting in all to $1,360,000, on which we ought to receive our commission.

Other contracts have been entered into since then which, of course, do not enter into our consideration. But through the services rendered Oscanyan in getting Rustum Bey to recommend the Winchester rifle, millions and millions of dollars have come into the coffers of this grasping and greedy defendant.

Now, gentlemen, allow me here to call your attention to the law, and if I am in error the court will, of course, correct me. The law in regard to the broker's commissions is summed up in two words.

The broker must be the procuring cause; that is, he must be the in-
strument by which in the first place the parties are brought
71 together. It is not enough to say that some one else might have done the same thing; if he did it, if he brought them together, and if, through his instrumentality, the transaction was brought about, and as in this case if without his instrumentality the probabilities and even the certainties would be that the transaction would not be brought about, the law regards that person as the procuring cause.

Now allow me briefly here to see whether the facts which I have stated show Oscanyan was the procuring cause of the sale of the arms. Suppose you are, we will say, a dry-goods merchant. You bring to me a bill of goods, a box of dry-goods, and I say I don't want them. You then turn to some else and say, "Won't you please recommend these goods to so and so?" That party says, "Yes, I will, if you will pay me, see if I can get him favorably disposed to you and a sale ensues, why then you would expect your commission." That party comes to me. Well, I am disinclined, and he begins to argue upon the subject in every way to show that it is not so objectionable as I supposed, and I purchase them. Would not you consider, if you had been the party
who induced me to buy, that you were entitled to your commission
72 upon the sale? It is an insult to the common sense of humanity to suppose otherwise. And that is precisely this case. Rustum Bey did not want the rifle. He objected to it time and time again. It was only through the influence and through the exercise of the perseverance and persistance of Oscanyan that he finally concluded that he would recommend it to the Ottoman Government. And, mark you, that was all really that was necessary. The Ottoman Government relied upon Rustum Bey for any report he would send. Without his sanction and without his report the Ottoman Government would not have introduced the Winchester rifle into its army. But the defence here is going to be that the Azarians procured it. We will see. Let us see if Oscanyan was not the procuring cause, or whether the Azarians were.

You will recollect that on the 18th of April the samples which Oscanyan had sent to the Turkish Government arrived in Constantinople. Now, on the 21st of April, Azarian pére et fils wrote a letter to Halil Pacha, who was the minister of ordnance, and who took the sample which Oscanyan had sent into the presence of the Sultan. "By our
73 letter of the 28th of March." Now, gentlemen, here is a letter addressed to Halil Pacha, the officer of the government through whom all communications relating to affairs of this kind must reach the Sultan. Let us see what Halil Pacha says in reply to that letter, which will show you how much influence the Azarians had with Halil Pacha. The letter is Exhibit G on the commission, dated 23rd of April, 1870.

"Be kind enough to call and take your samples out of the way, please; their room is worth more than their company." The irade had been issued, subject to a trial. That trial had not taken place because of the duplicity of the defendant. Well, gentlemen, I don't suppose that I ought to detain you any longer. I think I have presented to you in as clear a light as I can the facts which we intend to establish in our case. We think, gentlemen, that we have been wronged, that we have been grieviously wronged, that the defendant in this case, knowing of our intimate relations to Rustem Bey, knowing that all transactions with Rustem Bey were made to a great extent
74 through our influence, knowing that other parties approached him through us, knowing that our influence was great with him, and that having associated officially with him here and elsewhere, that we had been boys together, and that consequently we had influence with each other, the defendant came to us with a promise that he would compensate us if through our agency he succeeded in obtaining the favor of Rustum Bey, the authorized agent of the Turkish Government, and through him the ordinance, the irade, which was all that was necessary, except the trial of the guns. I say when we had done all that we had done our whole duty to the defendant, and that the defendant in securing and using our services in that way, and giving us a written promise to pay us therefor, and refusing to comply with that promise treated us wrongfully, and we come before you and ask for a verdict at your hands if we establish the facts which I have stated.

My associate informs me that I ought also to state to you an additional fact which we will establish, which we will prove—if not at
75 this time, we will prove it in our case—that the purchase was made at the prices which I have named here through our agency All we claim here is the sales that were made down to the time this action was commenced.

If we establish these facts, gentlemen, and the fact that if we had not used our influence with Rustum Bey those sales would never have been made, or even if they could have been made by some one else, they didn't do it; that we used our influence with Rustum Bey, and induced him to send a report to the Turkish Government; that he sent the samples to Constantinople; that he took the samples out of the custom-house; that he gave these samples to the officials there and they took them before the Sultan; the Sultan issued his imperial ordinance, his irade, for 20,000, subject to trial; that the trial took place; that the guns were approved and a sale ensued. If we prove all these facts gentlemen, we cannot doubt that we will receive a verdict at your hands.

The counsel for the defendant thereupon objected that it appeared by the matters stated in the said opening, on the plaintiffs part, that
76 the plaintiff was not entitled to maintain this action, and moved

the court to direct the jury to render a verdict for the defendant. The court enquired of the plaintiff's counsel if they claimed or admitted that the statements which had been made were true, to which question the plaintiff's counsel replied in the affirmative.

The court thereupon and after argument directed the jury to find a verdict for the defendant.

The plaintiff's counsel then and there, and before verdict, duly excepted to the direction of the court to the jury to find a verdict for the defendant, and duly excepted to the ruling of the court granting the defendant's motion.

The jury rendered a verdict for the defendant as directed by the court, and inasmuch as the matters above stated do not appear by the record of this cause, the plaintiff has prepared this bill of exceptions, to which the said judge has during said term set his hand and seal this seventh day of March, 1878.

N. SHIPMAN, [L. S.]
Judge.

77 (Endorsed:) U. S. circuit court. Christopher Oscanyan versus. The Winchester Repeating Arms Company.

The within bill of exceptions is allowed.

N. SHIPMAN, *Judge.*

ROBINSON & SCRIBNER,
Def't's Att'ys, 102 *Broadway, New York.*

HERMAN H. SHOOK, Esq.,
Att'y for Plaintiff, 149 *Broadway.*

Rec'd Feb. 4th, 1878.

U. S. circuit court. Filed Mar. 8, 1878.
JOHN I. DAVENPORT, *Clerk.*

78 U. S. circuit court, southern district of New York.

CHRISTOPHER OSCANYAN
vs.
THE WINCHESTER REPEATING ARMS COMpany.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

John D. Hanning, being duly sworn, says that he resides at 716 Atlantic st., city of Brooklyn. I am a contractor; place of business 716 Atlantic st., Brooklyn. I am interested in some street cleaning in Brooklyn under contract. I have lived at 716 Atlantic st., Brooklyn, for the last seventeen years. I own a plot of ground seventy-five feet by a hundred feet on the north side of President st., about 97 feet west of Seventh avenue, in the city of Brooklyn. I purchased it in 1875;
79 the consideration was $7,500. I purchased from a man named Nichols. There is a mortgage of $3,000 on the property. I have had an offer of $9,000 for the property, but refused it. I own real estate in the State of Georgia, in Tatlam Co. I value it at $5,000 gold. There is no encumb'ance on this property. I would not sell it at that. I am worth $10,000 personal property outside of my real estate. $500 will pay every debt I owe in the world, exclusive of the mortgage.

J. D. HANNING.

Subscribed & sworn to before me this 2d day of May, 1878.
JOHN A. SHIELDS,
U. S. Commissioner for N. Y.

We have no objection to the sufficiency of the surety.
ROBINSON & SCRIBNER,
Def't's Att'ys.

80 U. S. circuit court, southern district of New York.

CHRISTOPHER OSCANYAN
vs
THE WINCHESTER REPEATING ARMS COMpany.

Please take notice that John D. Hanning, the surety named in the bond for costs on writ of error dated April 30th, 1878, hereto annexed, will appear before Hon. John A. Shields, commissioner, for examination touching his sufficiency as such surety, on the 2d day of May, 1878, at 2 o'clock in the afternoon, in the office of the clerk of this court, in the post-office building, in the city of New York, and at the close of said examination, or as soon thereafter as counsel can be heard, the said bond will be presented to the court, or a justice thereof, for approval.

81 Dated New York, May 1st, 1878.
Yours, &c.,
HERMAN H. SHOOK,
Pl'ff's Att'y, 149 B'way, N. Y.

82 *Bond for costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

CHRISTOPHER OSCANYAN, PLAINTIFF,
vs.
THE WINCHESTER REPEATING ARMS COMpany, defendant.

Know all men by these presents that we, Christopher Oscanyan, of the city of Brooklyn, county of Kings, State of New York, United States of America, and John D. Hanning, of the city of Brooklyn, county of Kings, State of New York, United States of America, are held and firmly bound unto the above-named defendant, in the sum of two hundred and fifty dollars, to be paid to the said defendant, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the thirtieth day of April, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas the above-named plaintiff is about to prosecute the above-named defendant to the Supreme Court of the United States, by writ of error, to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the southern district of New York, and entered on the 13th day of March, 1878:

Now, therefore, the condition of this obligation is such that if the above-named plaintiff shall prosecute his writ to effect, and answer all

damages and costs if he fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

C. OSCANYAN. [L. S.]
JOHN D. HANNING. [L. S.]

Sealed and delivered and taken and acknowledged this 30th day of April, 1878, before me,

[L. S.] WALTER D. EDMONDS,
Notary Public, City & County of New York (No. 44).

83 UNITED STATES OF AMERICA,
Southern District of New York, ss:

John D. Hanning, the surety named in the within bond, being duly sworn, doth depose and say that he resides at 716 Atlantic ave., in the city of Brooklyn, county of Kings, and State of New York; that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

JOHN D. HANNING.

Sworn to this 30 day of April, A. D. 1878, before me,
WALTER D. EDMONDS,
Notary Public, City & County of New York, No. 44.

STATE OF NEW YORK,
City & County of New York, ss:

I, Henry A. Gumbleton, clerk of the city & county of New York, and also clerk of the supreme court for the said city & county, being a court of record, do hereby certify that Walter D. Edmonds, before whom the annexed deposition was taken, was at the time of taking the same a notary public, dwelling in said city & county, duly appointed and sworn, and authorized to administer oaths to be used in any court in said State, and for general purposes; and that his signature thereto is genuine, as I verily believe.

In testimony whereof I have hereunto set my hand, and affixed the seal of the said court & county, the 30th day April, 1878.

HENRY A. GUMBLETON, *Clerk.*

(Indorsed:) Vol. , page . U. S. circuit court. Christopher Oscanyan vs. The Winchester Repeating-Arms Company. Bond for costs on writ of error and notice. Herman H. Shook, pl'ff's att'ys, 149 B'way, N. Y.

Bond approved.

W. G. CHOATE, *D. J.*

Service of a copy within bond & notice is hereby admitted this 1st day of May, 1878.

ROBINSON & SCRIBNER.

U. S. circuit court. Filed May 2d, 1878.
JOHN I. DAVENPORT, *Clk.*

84 UNITED STATES OF AMERICA:

To the Winchester Repeating-Arms Co., greeting:

You are hereby cited and admonished to be and appear at a Supreme

Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Christopher Oscanyan is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 2d day of May, in the year of our Lord one thousand eight hundred and seventy-eight.

WM. G. CHOATE,
District Judge of the United States for the Southern District of New York.

85 (Indorsed:) U. S. circuit court. Christopher Oscanyan vs. The Winchester Repeating-Arms Company. Citation. Hermon H. Shook, proctor, 82 Nassau st., N. Y.

Service of a copy of the within citation hereby admitted this 21st day of June, 1878.

ROBINSON & SCRIBNER,
Att'ys for Def't.

U. S. circuit court. Filed June 26, 1878.
JOHN I. DAVENPORT, *Clerk.*

(Indorsement on cover:) No. 262. Christopher Oscanyan, plaintiff in error, vs. The Winchester Repeating Arms Company. S. New York C. C. U. S. Filed 12th October, 1878.

SUPREME COURT,

OF THE UNITED STATES.

CHRISTOPHER OSCANYAN, *Plaintiff in Error,* *against* THE WINCHESTER REPEATING ARMS COMPANY.	Statement of Facts and Points for Plaintiff in Error.

STATEMENT OF FACTS.

This is a Writ of Error to the Circuit Court for the Southern District of New York, (fol. 1).

The action is brought to recover $136,000 commissions for services by plaintiff below, in presenting and bringing to the attention of an official of the Turkish Government, the arms and ammunition of the defendant below, a corporation established in Connecticut for the manufacture of fire arms, (fols. 7, 10, 70).

The action came on to be tried in December, 1877, in the Second Circuit before the Honorable Nathaniel Shipman; a jury was empannelled and the case opened by counsel for plaintiff below (fol. 35).

At the close of the opening and before any evidence was put in, on motion of counsel for defendant below, the Court directed a verdict for defendant (fol. 76).

The case comes here upon a Bill of Exceptions (fol. 35) containing only one exception, that being to the direction of a verdict on the opening (fol. 76).

The general ground of this direction was, that it appeared by the matters stated in the opening that the plaintiff, in error, was not entitled to maintain this action (fol. 76).

The special ground was, that the contract on which the action is brought, is a contract which is corrupt in itself, and which is prohibited by morality and public policy (fol. 23).

The contract sued upon was a promise by defendant in error to pay plaintiff in error commissions on all sales of Winchester arms and ammunition to the Turkish Government (fols. 10, 50), the consideration of the promise being the services of plaintiff in error as agent for defendant in error in presenting and urging the claims and advantages of Winchester arms before a Turkish official, named Rustem Bey, (fol. 9).

Rustem Bey was an Inspector of the Ottoman Government, sent to this country to examine and report upon various arms, ammunition and paraphernalia of war (fol. 38).

The plaintiff in error was a "Turkish Consul General" in New York city—an honorary office without compensation from the Turkish Government (fol. 39). That government had a consul in that city at that time, and has one still, but the office of Consul General was created as an honor to be conferred upon the plaintiff in error (fol.65). The same government had previously shown its respect for him by his appointment to a high office in the palace of the Sultan (fol. 37). His holding such titular office did not in any way preclude or interfere with his right to act as a merchant in the United States to any extent (fol. 39). He was also permitted and encouraged by that government to receive the commissions, for the recovery of which this action is brought (fol. 40). Similar permission and encouragement was given the plaintiff in error by the Turkish Government in regard to other commissions for services of like character for other parties (fol. 40).

The Ottoman Government is the Sultan (fol. 43). Whenever, in the opening, the name of that government is mentioned, the Sultan is intended. All the power of that empire is centred in him. The government is an absolute monarchy, perhaps the only absolute monarchy

now existing in Europe. His will is supreme and is made known by edicts. The particular edict in this case is called an *irade* (fol. 43).

At this time the Ottoman Empire was in a most imperious exigency. The Eastern question was assuming warlike appearances (fol. 38). Preparations for the approaching conflict became an urgent necessity (fol. 38). Accordingly Rustem Bey was sent to this country to examine and report on arms and ammunition (fol. 38). Although an able and educated man he did not understand the English language, and was a stranger to our soil and customs (fols. 39, 40).

Rustem Bey being ignorant of the English language, and being obliged to deal with the various sellers of arms through their agents employed by them to present the merits of their wares, he very naturally preferred that the plaintiff in error, who was equally familiar with the English and Turkish languages, should be used in that capacity

The plaintiff in error was his acquaintance, and was well versed in languages and could act as an interpreter between himself and the contractors (fol. 40).

The manufacturers and dealers were also in need of a person of these qualifications, and were not slow in seeking the services of plaintiff in error (fol. 39). With the exception of defendant in error all the parties have paid him the commissions to which he was entitled (fol. 40).

The opening does not show that the contracts between the parties to this action, or between the plaintiff in error and other parties were, in any sense, contracts to control the business operations of the Turkish Government.

Rustem Bey was not the purchasing agent of that government, nor was the plaintiff in error his business manager.

Rustem Bey was merely an inspector of arms. The plaintiff in error was merely the advocate of various parties, presenting, exhibiting and urging the claims and advantages of their various arms. Neither of them had anything to do with fixing prices, or with the making of the contract of purchase or sale.

His position was fully known and understood by all parties interested—by Rustem Bey and by the Sultan (fol. 11, 40, 46, 67).

The complaint says (fol. 9 & 10), that on or about the months of "July or August, 1869. Oliver F. Winchester, president of the defendant, was introduced to the plaintiff in the City of New York "without plaintiff's solicitation, and informed plaintiff then and there "that he was acquainted with the fact of said mission of Rustem Bey "and the desires aforesaid of said Turkish Government and urged "plaintiff to present to the notice of said Rustem Bey the defendant's "said arms and appurtenances thereto for trial and inspection to the "end, that the same might be adopted by and sold to said Turkish "Government by defendants requesting plaintiff to interest himself as "agent for defendant in the matter, and sending specimens of said "arms and appurtenances thereto to plaintiff to be submitted by said "plaintiff to said Rustem Bey and said Turkish Government for the "end and purposes aforesaid."

It appears by the opening that after the introduction and request of Winchester to the plaintiff in error, the latter presented one of the rifles of the defendant in error to Rustem Bey who did not like it (fol. 41), for the reason that it seemed to be too complicated for the use of the ordinary soldier (fol. 46), but with other samples he put it into a box and shipped it to Constantinople without any comment or recommendation (fol. 42). Subsequently at the instance of plaintiff in error he thought he would go so far as to recommend the purchase of 1,000 for the use of the Imperial Body Guard who were experienced soldiers and veterans (fol. 46 & 47). After this Rustem Bey receives fresh instructions from Turkey to inquire and report on the price of 20,000 repeating arms of the manufacture of defendant in error, and also asking for fresh samples (fol. 48). He then raises another objection to the rifle (fol. 49) which the plaintiff explains and shows to be without foundation (fol. 54). Rustem Bey then reports back to the Ottoman Government and fresh samples are shipped (fol. 54).

On the arrival of the samples at Constantinople a trial of the arm takes place with success, and the Sultan approves the rifle (fol. 58). Two contracts for the defendant in error result amounting in the aggregate to $1.360,000, on which the plaintiff in error claims his commissions in accordance with the agreement in suit (fol. 10, 50).

There are no statements in the opening of any corrupt or collusive conduct by any of the parties interested, nor any statements from which it can be inferred.

The foregoing are all the substantial and material facts involved in the question on the motion below.

There are some peculiar facts and circumstances in regard to the opening of counsel on which the motion for a direction of verdict was predicated, to which attention is respectfully requested.

Owing to the forced withdrawal on account of sickness of the original attorney of record, and the engagement of the original associate counsel in the Vanderbilt will case, the trial of which was pending at the time this case was forced on—neither of which facts were deemed sufficient by the court below to grant a short continuance—the present attorney of record was suddenly substituted and compelled to open to the jury on very short and hurried preparation (fol. 46) with few opportunities for consultation with the plaintiff in error or either of the present associate counsel, whose appearance in the case is also the result of the unexpected circumstances above mentioned.

The assignment of errors is as follows:

1st. It was error to direct a verdict on the opening.

2d. It was error to hold that the contract sued upon, was corrupt in itself and void for illegality.

POINTS.

Point I.

The Circuit Court erred in dismissing the case or in directing a verdict for the defendant for want of power to do so.

I.

It is a settled rule in the Supreme Court of the United States, that the Circuit Court has no power to grant a peremptory nonsuit.

Elmore vs. *Grymes*, 1 Peters, 469.

D'. Wolf v. *Rabaud*, 1 Peters, 476,
Crane v. *Morris*, 6 Peters, 598.
Silsby v. *Foote*, 14 How., U. S. 218.
S. C., 1 Blatchf., 445.
Castle v. *Bullard*. 23 How., U. S., 172.
Folger v. *Shaw*, 2 Woodb. & Minot, 531, & cases cited.
Congress Farming Spring Co. v. *Edgar.*, 18 Am. Law Reg. N. S., 613.
Schuchardt v. *Allens*, 1 Wallace, 359,
Boucicault v. *Fox*, 5 Blatchford, 87, 91, p. W. D. Shipman, J.
Merchant's Bank v. *State Bk.*, 10 Wallace, 655.
Clifford's Opinion.

All of these cases arose on motions at the close of the plaintiff's case, after his evidence was all in, and the Court has held by a perfectly consistent course of decisions, that there was no power to order a non-suit against the plaintiff's consent.

In other words, he had a right to have a true trial, the production of evidence and the submission of his case to the jury. Anything less than this would be to deprive him of the right of trial by jury, guaranteed to him by the U. S. Constitution Art. 7, Amendments.

This rule may be to some extent modified by a practice of recent origin, allowing the Court in certain cases after the plaintiff's *evidence is all in*, to direct the jury to find a verdict for the defendant.

Giblin v. *McMullen*, L. R. 2 Privy Council Appeals, 335
Improvement Co., v. *Munson*, 14 Wall., 448.
Pleasants v. *Fant*, 22 Wall., 120.
Parks v. *Ross*, 11 How., U. S., 373.
Commissioners, etc. v. *Clark*, 94 U. S., 278.
Orleans v. *Platt*, 99 U. S., 676.

The effect of these and kindred cases is, that there may be in a trial a preliminary question for the judge, whether there is any evidence, upon which a jury may properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.

It will be observed, that this principle is a special one, requiring the Court to act *upon evidence* and not allowing a verdict for the de-

fendant *to be directed*, unless upon the failure of the plaintiff to relieve himself from the burden of proof.

The old rule is not abrogated, but only practically modified through the fiction of a directed or compulsory verdict.

This doctrine cannot be made applicable to the present case for the following reasons:

1. It is a rule simply for *weighing evidence.* In the case at bar, no evidence was permitted to be offered. By no possible fiction can there be a *verdict*, when no trial is permitted. Calling this dismissal of the case a "verdict," does not change its essential character. The motion to direct a verdict for the defendant cannot be made until the *close* of the plaintiff's case.

> *Merchants' Nat. Bk.* v. *State Nat. Bk.*, 3 Clifford, 205.
> *Congress Empire Spring Co.* v. *Edgar*, 18 Am. Law Reg., 618.

The rule is stated in this case, as follows: "Circuit Courts cannot grant a non-suit, but the defendant *at the close of the plaintiff's case* may move the Court to instruct the jury, that the evidence introduced by the plaintiff is not sufficient to maintain the action, and to direct a verdict for the defendants. In considering the motion, the Court proceeds upon the ground, that all the facts stated by plaintiff's witnesses are true, and the rule is, that the motionwill be denied, unless the Court is of opinion, that in view of the whole evidence and of every inference, that the law allows to be drawn from it, the plaintiff has not made out a case, which would warrant the jury to find a verdict in his favor."

The whole subject is summed up by the late Mr. Justice Benjamin R. Curtis, in his posthumous work on "The Jurisdiction, Practice and Peculiar Jurisprudence of the Courts of the United States," p. 222. He says: "The Courts of the United States have no power to grant a motion for a nonsuit. They must submit every common law case to a jury. But then that is rather a matter of form, because they have power, when the plaintiff has exhibited all his evidence, to receive a motion to instruct the jury that the evidence will not warrant the jury in finding a verdict for the plaintiff; it being considered by the

Supreme Court to be a question of law whether all the evidence exhibited will warrant the jury in finding a verdict for the plaintiff, and if the judge gives or refuses that instruction, it is ground of a writ of error. But then it must be borne in mind, that if there is any evidence exhibited by the plaintiff which would or might, in the judgment of the jury, tend to support the claim of the plaintiff, any evidence, no matter whether the judge would find that to be sufficient or not, he must submit it to the jury; so that the only case in which a judge can instruct a jury that the evidence exhibited does not warrant them in finding a verdict for the plaintiff, is the same case where he would order a nonsuit It is, therefore, merely a different mode of proceeding arising out of some conception which the early judges had that the constitution, having provided for a trial by jury in all cases at common law, the jury must somehow pass upon the question under such an instruction as I have spoken of," citing *Merchant's Bank* v. *State Bank*, 10 Wallace, 655.

It is plain that this distinguished judge and most lucid expositor was of opinion that the motion to direct a verdict is only to be entertained *after the evidence on the part of the plaintiff is all in*, and then though different in form, in substance it is a motion for a nonsuit.

2. The principle of these cases, though perhaps sound, is not to be applied to the facts of this case. They confessedly give new power to the Court, requiring caution and delicacy in its exercise. Confined within the present limits, they do not deprive a plaintiff substantially of trial by jury. If extended to the present case, they make a plaintiff's rights turn upon the unguarded or imperfect expressions of counsel, which might perhaps be supplemented or corrected, when the evidence was in. Under these decisions the plaintiff has a right to have the *testimony* passed upon by the Court, without being handicapped by the unskillful opening of his case by counsel.

3. The ground on which the Court dismissed this action, was no part of the plaintiff's in error case. The main basis of the decision was, that the plaintiff in error was at the time he performed the services for which he sought to recover, Consul General of the Turkish Government, and for that reason incapable by law of entering into the contract with the defendant. This was not in the complaint and unnecessary for the plaintiff in error to prove. Though stated in the opening, it need not have been proved at the trial. It was matter for

the defendant, if he chose to introduce it, for the purpose of attacking the plaintiff's *prima facie* case.

If that were to be taken into account, we insist that we had a right to show, as a matter of fact, the duties of a *Turkish* consul general, and that they were in no respect inconsistent with the plaintiff's conduct in this case, and thus to go to the jury on the facts of the whole matter in controversy.

4. There were special grounds, why this method of procedure should not be applied in this cause. The counsel who opened the cause, had been but recently called into the case and had but insufficient time for preparation. The older counsel had absolutely none. The defense of illegality had not been disclosed in any way Under the New York decisions, as will be seen hereafter, it would have been disregarded or have raised a question for the jury.

This method of procedure cannot be sustained on the ground suggested by the Circuit judge, that it is according to the practice in his circuit. It is the duty of this Court, when its attention is called to anomalies in the practice at the circuits, to correct them. This point was vigorously urged in the case already cited of *Elmore* vs. *Grymes*, 1 Peters, 469, 472, 473, by JOHNSON, *J.*, in a dissenting opinion. As Circuit Judge in his circuit, he had long followed the practice of compulsory nonsuit. The Court declined to give heed to any suggestion based on this inveteracy of practice and overruled it.

Moreover, this practice is directly opposed in principle to the decision in *Silsby* vs. *Foote*, 14 How. (U. S.), 220, CURTIS, *J.*, delivering the opinion. In that case, this Court allowed a new juror to be introduced into the jury box in place of one who had been relieved from attendance on account of sickness, *between the opening of the case for the plaintiff and the introduction of his evidence*, placing its decision on the ground, that it cannot be supposed to have injured the plaintiff. How, under this decision, can the opening speech of counsel be regarded as *equivalent* to the evidence?

5. The argument *ab inconvenienti* should have strong weight in this case, as the Court is asked by the defendant in error to introduce a new rule of practice.

(1.) If the Court sanctions this method of procedure, it will be required to disentangle the facts stated by counsel from their arguments, and to interpret their addresses to the jury, which are made usually in a popular form, and without precision of expression. There will thus be introduced an element of difficulty and uncertainty into the administration of justice in the Court of last resort. Opposing counsel will wrangle over the meaning of loose and unguarded expressions used in the opening, instead of grappling with the real merits of the cause.

(2.) This course of practice will tend to multiply appeals. If the Court reverses the decision of the Circuit Judge in such a case on his version of the plaintiff's theory, it may happen that the whole discussion has turned on a hypothetical state of facts. On a second trial, the opening may be made more skillfully, or the testimony produced may be so materially different, that a second appeal will in no respect, be governed by the rule laid down in the first. Difficulties such as these arise, when testimony is introduced. They will be multiplied if this course of practice is sanctioned.

3. This practice will be injurious to the administration of justice in the Circuit Court. Counsel will refrain from making opening speeches altogether or be tempted to make statements beyond what the testimony will bear. The one course will promote obscurity, the other disingenuousness.

4. This practice once sanctioned will tend to withdraw the junior counsel from active participation in trials at the Circuit, and to throw additional burdens upon senior counsel, all to no purpose. It will not be safe to entrust the business of making opening addresses in leading causes except to the most skillful and experienced men. The junior members of the bar will thus be in a measure bereft of an important, rather an indispensable, means of professional training.

II.

The Circuit Court erred in dismissing the case, because illegality was a defence that should by every rule of logical pleading have been set up in the plea. This rule is carefully preserved by the Supreme Court of the United States.

See *Hill* vs. *Mendenhall*, 21 Wallace, 453, 455 and the course of reasoning on p. 455, by the Chief Justice.

Also, *Schulenberg* vs. *Harriman*, *id.*, 59.

III.

The cause was treated by the Circuit Judge as strictly a case under the Federal practice, there having been a declaration filed, and the general issue pleaded. The correct rule is, that it is governed by the New York Code of Procedure. See

Rev. Statutes of the U. S., § 914.
Bennett vs. *Maryland* Fire Ins. Co., 17 Alb. Law J., 363 (Northern District of N. Y.)
Lewis vs. *Gould*, 13 Blatchford, 216.
Bills vs. *R. R. C.*, id., 227.
Nudd vs. *Burrows*, 91 U. S., 426.
Indianopolis R. R. Co., *Horst*, 93 U. S., 291.

In that view it was necessary to set up the illegality in the answer. It will not be pretended that there is any allegation of this kind to be found in the plea.

The necessity of this allegation under the Code pleading is sustained by the following authorities:

Code of Procedure, § 149.
Code of Civil Procedure, § 500.

Section 149 in force, when this action was brought provides, that an answer to a complaint *must* contain a statement of any new matter constituting a defence. The uniform construction by the State Courts of the word "must," as here employed is, that if new matter, constituting a defence, is not in the answer, evidence of it cannot be offered at the trial.

McKyring vs. *Bull*, 16 N. Y., 297.
Marston vs. *Swett*, 66 id., 206 and cases cited.

Illegality under this rule is new matter, and must be set up in the answer.

Cummins vs. *Barkalow*, 1 Abb. App. Dec., 479, 485.
McKyring vs. *Bull*, *supra.*

In the last cited case is a full discussion of the grounds of the present rule. See also the following decisions:

O'Toole vs. *Garvin*, 3 N. Y. Sup. Ct. (T. & C.), 118.
Roe vs. *Angevine*, 7 Hun., 679.
Fowler vs. *New York Gold Ex. Bk.*, 6 id., 186, 193.

It will not be enough that the illegality appears in the proof. It *must* be alleged in the answer to be made available.

Brazil vs. *Isham*, 12 N. Y., 9, where the precise point was involved.
Button vs. *McCauley*, 38 Barb., 413.
Wright vs. *Delafield*, 25 N. Y., 266.

It is perfectly well settled that the decisions of the higher State Courts construing State statutes are obligatory upon the United States Courts:

United States vs. *Fox*, 94 U. S., 315.
Davis vs. *Indiana*, 94 U. S., 792.
Meister vs. *Moore*, 96 id., 76.
Davie vs. *Briggs*, 97 id., 628.
Mills vs. *Scott*, 99 U. S., 25.

This rule has been specifically applied to the construction of the code of procedure in Iowa.

Amy vs. *Dubuque*, 98 U. S., 470.

The principle of these cases was followed in the United States Court of the northern district of New York in the case already cited.

Bennett vs. *Maryland Fire Ins. Co.*, 17 Alb. Law Jour., 363.

The Circuit Judge in the case at bar suggests, that if the State practice is to be adopted, the defendant should have been allowed to amend and set up the illegality in his answer (fol. 31). It is enough to say, that this course was not taken, but an unwarrantable method resorted to by him.

The plaintiff in error insists, that the judgment in this cause should

be reversed on the ground discussed under this point. The important and perhaps difficult questions involved, the magnitude of the sums in controversy, demand that this cause should not be disposed of without a full and fair disclosure through the testimony of witnesses of all the facts and circumstances bearing upon the plaintiff's claim.

Point II.

If, however, the Court is of opinion that the defendant could raise the question of illegality, as presented in this cause, then the plaintiff in error insists, that there was no warrant in law in dismissing his cause. The most unfavorable aspect of his case is, that the question of illegality should have been submitted to the jury upon the evidence.

I.

The statements in the opening disclose a good cause of action independent of the element of illegality. It is set forth with sufficient fullness, that the plaintiff was employed by the defendant as his agent to present the merits of his repeating arms to Rustem Bey, and that he was the procuring cause of the contract made with the defendant, and entitled to the agreed commissions. By well-settled principles of law, this makes out a *prima facie* case in his favor, and presumptively entitles him to recover. Such contracts between private persons are not illegal.

Richard vs. *Quintard*, 51 N. Y., 636.

II.

(1.) PRELIMINARY.

Before entering upon the merits of the case, the plaintiff in error desires to state his construction of some perhaps unguarded expressions in the opening, which appear to have misled the Circuit Judge.

One of these is the word "influence," used at folio 41 and other places. That kind of influence, which has been justly condemned by Courts of justice, was not intended. This has been characterized as

"*corrupt influence.*" It is arranged in digests, and other authorities, under that head. Influence is either proper or improper. The influence referred to in the opening is proper or lawful influence. This has been defined to be that kind of influence, which one person gains over another by acts of kindness and attention, and by correct conduct.

Miller vs. *Miller*, 3 *Serg. & Rawle*, 269.
Cummins vs. *Barkalow*, 1 Abb. App., Dec. 479, 485.

Business men are properly influenced by the knowledge they acquire of the character of others through long acquaintance, and an uninterrupted friendship and course of fair dealing. These were the relations of Oscanyan and Rustem Bey.

To lay down the rule, that such relations must prevent parties from transacting business on the ground of a supposed danger of corruption or control, would substantially be an announcement to business men of a rule, that the less you know of a man the more you must trust him.

The statement, in the judge's opinion, that there was a "sale of the personal influence of the plaintiff" (in error), "over Rustem Bey," is not founded upon the proper construction of any words, used in the opening.

In the forty-first folio the plaintiff in error makes use of the word "favor." He said to Mr. Winchester, of the defendant company, that he was receiving commissions from all parties for the favor of acting for them in presenting their arms to the attention of Rustem Bey. This word is an orientalism, and the context shows that Oscanyan was speaking of services in presenting their arms to Rustem Bey, and not of any favor, which, as a government officer, he had power to grant.

(2.) The only defence open to the defendant is, that this contract for commissions was illegal. He says in substance to the plaintiff in error, "True, we made this contract, you have been loyal to its provisions and have brought me very large profits by means of it. I choose to retain the profits and defeat your claim, because it is necessarily and in point of law illegal. My claim is, that it is impossible legally for any person, being in the United States, to invite for compensation the attention of an agent of a foreign government employed

to recommend the purchase of supplies to his government at home to a suitable source of supplies, even though the foreign government approves of the transaction and the payment of the commission, and the contract for purchase is subsequently negotiated abroad with the full knowledge by the foreign nation of all the facts. I add, that this rule is especially applicable, because this plaintiff holds a purely honorary appointment under the foreign nation without any corresponding duties."

This is certainly a very extraordinary proposition, now for the first time maintained or upheld by any Court, in this country or in England. It is supposed, however, to find some support in former decisions of this Court. It will appear in the course of this discussion, that none go far enough to maintain it.

The case on which the defendant will rely is

Tool Company v. *Norris*, 2 Wallace, 45.

The proposition laid down in the head note to that case is very broad, and is in the following terms: "An agreement for compensation for procuring a contract from the government to furnish its supplies is against public policy, and cannot be enforced by the Courts."

Like most abstract propositions before Courts of Justice, it must be read in the light of the facts in the case.

The facts had been fully brought out before the jury, and showed a case of disreputable solicitation by the broker, and the use of irregular and improper influences. It was in the view of these, that the judge was asked to instruct the jury as to the nature of the contract, and his language, as well as that of this Court, is to be taken in connection with the facts referred to.

What the Court referred to was not the ordinary case of a contract to negotiate a bargain between a buyer and seller, but one understood to be obtained as a *favor* from a government officer having power to award the contract. Irregular influences were contemplated to be used by the negotiator with the head of the department. This is shown by the language on p. 55. If more than this were meant, it is respectfully submitted, that the broad proposition that every agree-

ment for a compensation for procuring a contract from the Government for supplies is against public policy, cannot be sustained.

1. Such an arrangement is not corrupt *in its own nature*, when considered as a mercantile contract. Merchants constantly enter into the most important contracts through the medium of brokers, receiving contingent compensation from the other party to the contract. Houses and lots are constantly bought and sold in the same way. The experience of mankind teaches them that there is no serious danger in this transaction, but, on the other hand, much convenience. The fact that the compensation is contingent, does not *of itself* make it corrupt. (Cases hereafter cited). Why then should the employment be *inherently* corrupt, when entered into on behalf of the Government? With due respect, is not an assertion that it is merely a begging of the question?

2. The denial to the Government of the right to permit a broker, receiving compensation, to negotiate a contract, deprives it of one of the most efficient agencies to accomplish its purposes. Such a denial would be deemed a hardship by a merchant purchasing goods, or by one buying or renting a house. Why should the Government sustain a burden which a private person would not willingly bear?

3. The rule in *Tool Co.* vs. *Norris*, in its broadest construction does not permit the seller to act through *any* agent, paid a compensation, whether a salary or commissions. It is submitted, that such a rule, requiring *uniformly* the action of principals is highly and unnecessarily inconvenient.

4. The true function of the Court in such cases is to distinguish between such agreement of this kind as are innocent and meritorious and others, that owing to the influences used, are corrupt and illegal. It is impossible to draw an indictment against an entire class of men, such as brokers. The class has its honorable as well as its vicious members. Contracts made through the agency of the one class should be upheld, when entered into through the other, it should be overturned.

The plaintiff in error, here respectfully refers to the letter of the Secretary of the Navy, of January 14, 1862, in reference to a resolution of the United States Senate, that he be directed to "report to the Senate the facts in regard to the employment of George D. Mor-

gan of New York, to purchase vessels for the use of the government and to report the amount of compensation paid him." In this letter Ex. Doc. 15 Senate, 37th Congress, 2d Session, there is an ample vindication of the propriety and utility of employing brokers for a commission to purchase supplies for the government, when this is done with no corrupt intent (pages 2, 3 & 4).

When this matter came before the Senate, Jan. 27, 1862, a resolution was offered by Mr. Hale from the committee on Naval affairs to the effect "that the employment of an agent to make purchases for the government with a compensation, dependent upon the extent and costliness of his purchases, is unwise and inexpedient, and ought not to be tolerated in any branch of the public service."

Congressional Globe, Feb. 15, 1862, p. 817.

Mr. Wilson of Massachusetts, offered an amendment, striking out all after the word "Resolved," and inserting the following: "that the employment of an agent to make purchases for the government, where compensation depends on commissions on the purchases made, is unwise and inexpedient and should never be resorted to, except in cases of the most imperious necessity."

The whole subject was by a vote of the Senate laid upon the table. Yeas 31. Nays 5, Cong. Globe 821.

Both forms of the resolution present the purchase simply as unwise and inexpedient. There is no hint of the transaction being "*inherently contra bonos mores.*" The Senate most emphatically declined to commit itself to the unwisdom and inexpediency of such an employment, considered as a general proposition.

It may be said, however, that the case of the Government is not like that of an ordinary purchaser, because it must employ agents on its own side to negotiate with the agent or broker paid by the other side. The danger is, that the Government agent will collude with the seller's agent, and therefore, the power to make the contract should be denied.

The answer is, that this view is not effective in mercantile transactions. No merchant, purchasing goods, hesitates to allow his agent to negotiate a sale through a purchaser's broker. It is also an error in

reasoning to argue against the existence of a power from the possibility of its abuse.

The cases in this Court admit the propriety of employing a professional man for a contingent compensation to present a claim before a Board of Commissioners to adjust demands against a foreign Government. The fee was a stipulated percentage on the amount recovered.

Wylie vs. *Coxe*, 15 How. U. S., 415.

The same rule was applied to a proceeding before a commission to adjust claims against the Choctaw nation, under a treaty with the United States.

Wright vs. *Tebbitts*, 91 U. S., 252.

This rule was applied to the presentation of a claim pending against the United States, in one of the Executive departments.

Stanton vs. *Embrey*, 93 U. S., 548.

The case of *Toole Company* vs. *Norris*, was explained in this case on p. 557, second paragraph, as being "a contract for an employment to *improperly influence public agents in the performance of their public duties.*"

The case of *Stanton* vs. *Embrey*, *supra*, presented a case where the plaintiff was employed by the defendants to present a claim in their behalf before the Third Auditor of the Treasury, and subsequently before the Secretary and other officials of the Treasury Department, for a contingent compensation.

The Court said, that "professional services to prepare and advocate just claims for compensation are as legitimate as services rendered in Court, in arguing a cause to convince a Court or jury, that the claim presented or the defence set up against the claim presented by the other party, ought to be allowed or rejected. Parties in such cases require advocates, and the legal profession must have a right to accept such employment and to receive compensation for their services, nor can Courts of Justice adjudge such contracts illegal, *if they are free from any taint of fraud, misrepresentation or unfairness*," p. 557.

hat is the difference in principle between this case and the one at bar? In the one the attorney is employed to present the claim to the Secretary, for consideration; in the other, the agent acting for his employer, presents the claims of the goods proposed to be manufactured; in each case, the person employed is necessary to his employer; in each he acts in a professional capacity; in each he receives a contingent compensation, and in each the services rendered are meritorious, "*if free from any taint of fraud and misrepresentation or unfairness.*" Why should the Secretary be trusted by the Courts with the decision of the matter in hand in the one case and not in the other? Sublimated theories have prevailed in some jurisdictions preventing attorneys from making an agreement with any client for contingent compensation. These rules are based on a supposed public policy.

Pierce vs. *Beattie*, 32 L. J. Chanc., 734.
Grell vs. *Levy*, 16 C. B. N. S., 73.
Philby vs. *Hazle*, 8 C. B. N. S., 647; 7 Jur., N. S. 125.
Earle vs. *Hopwood*, 9 C. B. N. S., 566; 7 Jur., N. S., 775.

These authorities have been wisely rejected here as being unnecessarily restrictive, even when the attorney is employed for his client to transact legal business as between him and the government. Such rules of public policy are purely artificial, changing their complexion with the hue of the sky, where they are sought to be enforced. Would not a rule excluding all brokerage be equally artificial and unwise?

The case of *Count Pourtales Gorgier* vs. *Morris*, 7 C. B. N. S., 588 is one where a person of influence in Switzerland was employed for a compensation to procure a railway concession from the government. There was no intimation by the Court that the transaction was illegal though the promise turned out to be for past services, and for that reason without consideration. Reference may be made here to the expressions of the English Master of the Rolls in a late case. "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be

enforced by Courts of Justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."

> Printing and Numerical Reg. Co., *vs.* Sampson, L. R., 19, Equity 462, 465.

It is proper to refer under this branch of the subject to *Trist* vs. *Child*, 21 Wallace, 441. This was a contract for "lobby services," which are *in their nature* clearly improper. They are secret and not open. They are addressed to individual members, and not devoted to discussion in open session. Such service *never* can be useful. They have no analogy to services of brokers in mercantile affairs, these being commonly useful and meritorious. "Lobby services are carefully distinguished from such as are lawful in *Sedgwick* vs. *Stanton*. Opinion of Selden, *J.*, 14 N. Y., 293, 294. The claim of the plaintiff in error is sustained by the following decisions in the New York Court, some of which have been rendered since the decision in this Court of the case of *Tool Company* vs. *Norris*, and in view of that decision:

> *Sedgwick* vs. *Stanton*, 14 N. Y., 289.
> *Cummins* vs. *Barkalow*, 1 Abb., App. Dec. 479.
> *Lyon* vs. *Mitchell*, 36 N. Y., 235, 686.
> *Southard* vs. *Boyd*, 51 N. Y., 177.
> *Richard* vs. *Quintard*, 51 N. Y., 636.
> *Howland* vs. *Coffin*, 47 Barb., 653.
> *Brown* vs. *Brown*, 34 Barb., 533.
> *Sturgis* vs. *Steam Nav. Com.*, 3 Jones & Spencer, 251.
> *Mills* vs. *Mills*, 40 N. Y., 543.
> *Rose* v. *Truax*, 21 Barb., 361.

These decisions maintain as follows: *Sedgwick* vs. *Stanton*, *supra*, (A. D. 1856), presents the subject of lobby service in a clear light, and explains *Harris* vs. *Roof's Executors*, 10 Barb., 489. On page 294 of the report it is shown by SELDEN, *J.*, that the objection to these is the *personal and private nature* of the services to be rendered and that where the service is open and public and conducted in accordance with ordinary methods, there is no rule of public policy violated. The same principle or distinction is enforced in *Brown* vs. *Brown*, 34 Barb., 533.

In *Cummins* vs. *Barkalow*, *supra*, the facts were, that there was a dealer in arms who agreed to pay an agent for obtaining from the government an order for the purchase of arms, a share of the profits upon each delivery. It was held that such a contract was not necessarily void, as being opposed to public policy. It was further decided that it was necessary for the defendant, before he could raise the question of illegality, to have requested the Court to have made a finding of fact as to whether or not the services consisted *merely of his influence* with the government in securing the contract, or whether they were of an improper or unlawful character. The Court added, "the practice is well settled in such cases, and there is an utter failure to comply with it here, p. 485.

A carefully drawn distinction is here taken between the mere exercise of influence and services of an improper character, and these last are to be established as a matter of fact.

Lyon v. *Mitchell* (A.D. 1867) *supra*, p. 235. presents a case where an agent is employed to make a sale to the Government. A distinction was taken between a commercial transaction and an interference with legislative action or executive clemency, into which commercial principles do not enter. In the commercial transaction the agency is avowed and not secret and personal as in "lobby services." The broad proposition in *Tool Company* v. *Norris*, was disapproved, Justice Hunt delivering the opinion The general result of the decision is to maintain the distinction in *Cummins* v. *Barkalow*, supra. The dissenting opinion of *Grover*, *J.*, is to be found at p. 682.

Southard v. *Boyd* (A.D. 1872), turns upon the point, that the plaintiff did not agree to use any corrupt means to obtain the contract from the Government.

Howland v. *Coffin* 47 Barb., 653, 663, specifically decides that a contract by which the owners of a steamship agree to pay a broker a specified commission for obtaining a charter of their vessel from the United States Government is not void, on the ground that it contravenes public policy. The reasoning of the Court on p. 663 is very cogent. "We are not to presume necessarily, because this was a charter to be obtained from the Government, that any corruption or improper influences were to be resorted to, or that the undertaking was injuriously to affect or subvert the public interest. We are not to presume anything wrong in a transaction in which the Government is concerned. The plaintiff has as good a right to obtain a charter of this

kind for any other person, as he would have to obtain one for himself. If the defendants thought it best to employ an agent to procure this charter, who perhaps possessed better tact and had more time to devote to this business, they had a perfect right to do so; and by doing so, were not doing anything necessarily detrimental to the public interests. The contract is valid."

There is thus an unbroken current of New York decisions for twenty-five years, holding, that it is not *per se* unlawful to act as a broker for commissions in negotiating a contract with our Government, but that it must appear as matter of fact in the particular case, whether improper or immoral influences or measures were contemplated. The case is thus reduced to a question of fact for the jury.

Point III.

If, however, the Court should be of opinion that the case of *Tool Company* v. *Norris* is to be accepted as law in the broadest interpretation that can be put upon the language in its head note, we confidently insist that it cannot be applied to the Turkish Government or the Sultan of Turkey. Though it must be admitted that the contract in suit is a New York contract, yet the main contract upon which it acted was a Turkish one. If any rule of public policy was violated, it was a rule of Turkish policy. The act to be done must have been opposed to Turkish interests.

This Court would declare the contract void only on the ground, that some injury has been or is likely to be done to the administration of government in that country.

The case of *Tool Company* vs. *Norris*, goes upon the ground, that the agreements, which it condemns, are opposed to our system of government--of division of powers of departments, of offices considered as trusts. Such doctrines are not applicable to a country like Turkey, where no such divisions of power nor any such view of office-holding prevails. It is preposterous to extend to such a country views which appertain to our own system of republican institutions, carefully limited by constitutional restrictions.

Point IV.

Another point, distinguishing this case from the *Tool Company* vs. *Norris* case is the fact, that no *final contract* was made here by the broker. It was really referred home to Turkey to consummate the contract, where the plaintiff's influence could not reach. It was only made *after trial* of the arms in Constantinople. All that the plaintiff accomplished was to put the arms *for trial* before the proper authorities. The illegal element, if any, extended no further than that. It is accordingly too remote to vitiate the contract.

In the *Tool Company* case, the broker was brought into immediate connection with the head of the department and brought the illegal influence to bear directly upon the party, by whom the contract was consummated. Here it was, if at all, upon Rustem Bey, who held but an introductory relation to the actual parties to the contract. The language of the contract at folio 50 is to be taken in connection with the surrounding or accompanying circumstances as detailed in the opening, and as the parties understood the transaction at the time, it was entered into.

Railroad vs. *Clopper*, 1 Morrison's Transcript 491, (A. D. 1880).

The Court in *Tool Company* vs. *Norris* on page 56, used the following language: "all agreements for pecuniary consideration *to control the business operations of the government* or the regular administration of justice * * * are void as against public policy without reference to the question, whether improper means are contemplated or used in the execution. The law looks to the general tendency of such agreements and it closes the door to temptation, by refusing them recognition in any of the Courts of this country."

The passage is cited by the circuit judge in his opinion (see page 9), as applicable to the present case. He overlooks the fact, that there was no agreement here to *control* the business operations of the government. The most that the plaintiff was to do, was to cause the repeating arms to be submitted to the home government for *trial*. It closely resembles a case, where there is a competition for prizes between selected competitors, and the committee to select the competitors, are

induced to put a special and additional name before another committee, having power to make the award. There is no warrant for saying, that in such a case there is any contract to control the operations of the committee of award. Accordingly, the mischiefs and inconveniences do not exist, which are presented in the *Tool Company* case.

Point V.

A point on which we lay much stress, and which causes this case to differ *toto coelo* from the *Tool Company* and kindred cases, is, that the whole transaction was approved and encouraged by the Turkish government (see fol. 40). It is there stated that Mr. Oscanyan, in this and kindred transactions, *was permitted and encouraged by the Turkish government, and by its authorized agents, to take these commissions.* Such a permission clearly makes the transaction lawful and even meritorious, unless actual fraud or other misconduct appears.

1. The *Tool Company* case and other such cases go upon the ground that there is a division of political powers between three great departments—legislative, executive, and judicial—and that the executive department is bound by certain principles and rules, of which the judicial department will take cognizance, and thus confine its action within those rules. The Court will take judicial notice of the different organization of Turkey, and that no such division of political powers, as has been referred to, exists there. The Sultan comprises in himself all powers, whether legislative, executive or judicial. The maxim, "State, it is myself," is peculiarly true of him. Whatever he approves in the usual way, must be lawful, unless he has been defrauded.

Suppose that the people of the United States, by a clause in the constitution, had sanctioned the method of procuring government supplies through a broker; would the Court then say that, what the nation had ordained, was contrary to public policy? Certainly not. But this is, what Turkey has done through its only mouthpiece or exponent of its will.

This doctrine is distinctly laid down by Mr. Addison in his work on

contracts vol. 1, section 262 as applicable even to contracts affecting public affairs in the country where the contract is made.

"All contracts and agreements to pay money to Ministers of State for an appointment to a public office of trust, or for the grant of favors from the Crown, or for an appointment in the dockyard, the crown *being kept in ignorance of the bargain*, are absolutely null and void, as being contrary to public policy. But if the office is an acknowledged saleable office, and the transaction is carried on under public authority *and with the knowledge and consent of the Crown and of the parties who have the office in their gift*, as was formerly the case with sales of commissions in the army, the transaction is lawful and the contract growing out of it, may be enforced. * * * Exchanges of public offices and substitutions of one person in the place of another are lawful, when they are made with the knowledge and sanction of the public authorities and the parties who have the regulation and disposal of such offices; but secret and underhand agreements for exchanges of such offices are contrary to public policy and are consequently void."

2. More than this: there is a special reason why such an arrangement as is stated by plaintiff's in error, counsel should meet with approval in a government like that of Turkey. It is remote from us; it has but little business of a commercial nature; it might prefer that its business should be done by mercantile commissions rather, than by salary.

3. The business of brokers paid by commissions, is part of the law merchant, recognized throughout the civilized world. Why should the Courts of the United States say that a foreign government shall not make use of this mode of doing business, if it sees fit? This would be to tie up a foreign government in swaddling clothes, and to deprive it against its will of a usual and legitimate method of making contracts. Why does an arrangement, commonly honorable among merchants, become dishonorable *in its own nature* when applied to a State?

4. Assuming this arrangement to be in its own nature valid, there is nothing in the present case to show dishonorable conduct on the plaintiff's in error part. Fraud is to be proved and not presumed. There is nothing to show fraud. The prices are precisely the same, as would have been given, if the plaintiff had not been engaged in the contract (fol. 69).

There is nothing to show that Rustem Bey's official conduct was *controlled* by the corrupt personal influence of Oscanyan. The former did not recommend the Winchester arms, *because* Oscanyan suggested it. He knew that Oscanyan was the agent of the Winchester Repeating Arms Company (fol. 11), and Oscanyan was compelled to use the same argument and make the same efforts, which would have been necessary in an entire stranger. At first Rustem Bey did not like the rifle (fol. 41).

Then Oscanyan by the use of argument prevailed upon him to send a sample without recommendation (fol. 42), and succeeded in getting him to go so far as to recommend 1,000 for the use of the Imperial Body Guard (fol. 46). Then Rustem Bey raises another objection to the rifle (fol. 46). This objection is met by argument and removed by Oscanyan (fol. 54).

All this goes to establish the absence of that corrupt influence which the law condemns. The only influence in this case, which Oscanyan exercised over Rustem Bey was that moral power which all men of known ability, honor and integrity always have, and always will exercise, and that influence only operated in the way of satisfying Rustem Bey of the truthfulness of Oscanyan's representations in regard to the merits of the Winchester Rifle and the soundness of his arguments.

This view is confirmed by that passage on fol. 46, which refers to the recommendation to the Turkish Government by Rustem Bey for the purchase of 1,000 Winchester Rifles for the use of the Imperial Body Guard. The following language is used "in order to please Oscanyan, knowing of the fact that Oscanyan had this arrangement with the defendant, that he should receive a commission on sale to the Turkish Government, thought he would go so far as to recommend the purchase of a thousand for the use of the Imperial Body Guard, who were experienced soldiers and veterans."

It was claimed from this, that Rustem Bey was acting from considerations other than from the public good. It is the only place in the entire opening which can be made even to look in that direction. Every other reference to him shows that he was never actuated by any other considerations than duty to his sovereign, the Sultan of Turkey. But taking this sentence, either alone or in the light of surrounding

circumstances, and placing upon it the most favorable construction (the rule of non-suits), it will be found far removed from either corruption or favoritism, and one of his wisest and most advantageous acts for the Turkish Government.

When first presented to him Rustem Bey did not like the rifle (fol. 42), for the reason that it was too complicated for the use of the ordinary soldier (fol. 46).

If Oscanyan had had a corrupt personal influence over Rustem Bey, is it not a fair inference that the latter, knowing the former was to receive commissions, would have recommended *large* purchases of this rifle, instead of only 1,000? But Rustem Bey does not so act. From his examination of the gun he seems to have been satisfied that it was an unsafe arm to place in the hands of raw recruits, such as would necessarily compose the greater part of the Turkish army. But Oscanyan argues with him, that his objections do not hold in regard to the Imperial Body Guard, who were experienced soldiers and veterans, and succeeds in getting his recommendation for the purchase of 1,000—note the quantity!!!—1,000!!! for the use of that Imperial Body Guard (fol. 46, first part).

It should be remembered that even this recommendation did not insure a purchase before a trial in Turkey in the presence of the Sultan.

The fact, that by the most persistent efforts of Oscanyan (fols. 46, 58, 72), Rustem Bey would only give a limited recommendation is conclusive evidence, that the former had no corrupt personal influence over the latter.

How then can this transaction be claimed as evidence of inherent corruption in the conduct of either Oscanyan or Rustem Bey?

The result shows that the Turkish Government had a higher appreciation of the rifle than Rustem Bey, because he very shortly receives instructions to inquire and report the price of 20,000 repeating arms (fol. 48), and it is an historic fact that these same rifles brought victory to the Turkish army on the most famous battle fields of that memorable Russo-Turkish war.

Where such an act is in its own nature lawful, it lies with the defendant to show distinctly that corruption exists. It will not be established by mere inferences.

Lord Howden vs. *Simpson*, 10 Ad. & Ell., 793 and 815, S. C., House of Lords, under the name of

Simpson vs. *Ld. Howden*, 9 Clark & Finnelly, 61 (A.D.) 1842.

In this case the plaintiff in the Court below was a Member of Parliament (House of Lords). The defendants were proprietors of a railway company. A bill had been introduced into Parliament, according to which the line would pass through the plaintiff's estates and near his mansion, and he for that reason opposed the passage of the bill. A contract was then made, that if he would withdraw his opposition and assent to the railway, they would endeavor to deviate; and it was further agreed, that in case the bill should be passed, they would pay on a certain day £5,000, as compensation for damages on the deviated line, without prejudice to any claim the plaintiff might have, in case the deviated line was not adopted. The plaintiff, in his declaration alleged that he did withdraw his opposition in accordance with the agreement, that the bill passed, and he had not received his money as the contract provided. The plea was framed for the purpose of making out a case of illegality. The Court of Queen's Bench held, that the facts disclosed a fraud upon the Legislature. This decision was reversed in the Exchequer Chamber, and it was held, that the facts did not sufficiently disclose fraud, p. 815.

The decision of the Exchequer Chamber was affirmed in the House of Lords. The ground of the decision was, that the contract was not *in its general nature* void, as a peer, being a landowner as well as a Member of Parliament, had a right to protect his landed interest by legitimate means. Withdrawal of opposition was legitimate means. If this was done fraudulently or corruptly, the transaction would be void. The question came up on demurrer.

The following proposition was held in the House of Lords: "Inasmuch as Lord Howden (the plaintiff), though a peer, had a right to bargain in his individual character for compensation for injury to his property, and it was *not shown on the record* that the money was promised as a consideration for his vote being given or withheld, or that the parties to the agreement intended to conceal it from the individual landholders or from the Legislature, or that any fraud was intended or committed on any party, the transaction was valid."

The case is then authority for this proposition: assuming that an agreement, having a public aspect, is in its general nature valid, and the Court is asked to pass upon it, as a question of law, on the plead-

ings or in other appropriate form, the fraud must be distinctly disclosed and not merely inferred.

This rule will cover the case at bar.

The opening statement shows the arrangement with the plaintiff to be approved by the Sultan and therefore lawful. There is not a word to show abuse of confidence or anything beyond an intent to secure the commissions by a legitimate contract. This, as has been shown, was approved by the Turkish Government.

We confidently claim that this point makes it imperative upon this Court to reverse the decision of the Circuit Court.

Point VI.

The fact that the plaintiff was a Consul General of Turkey at the port of New York, does not make the transaction illegal.

I.

The case shows that the office of Consul General was created in this instance simply for the purpose of honoring the plaintiff. It was an empty title and nothing more. The office commenced and expired with the plaintiff in error, (fol. 65). There was no compensation attending it and only occasionally special services to be paid for by commissions, received from parties interested and not from the Turkish Government. All consular work was to be done by the Consul, who, it may be inferred from the evidence, was in New York at the time.

II.

It is plain, whatever the duties of the plaintiff in error have been, he had no relations of a fiduciary kind in reference to this transaction. The order was given by the Sultan to the Minister of War; from him it passed to the Minister of Ordnance, Halil Pacha; from him it passed to Rustem Bey. The transaction was a military one, conducted through military channels of communication. The plaintiff was in no way connected with the business, except so far as he might have been consulted by Rustem Bey, as any friendly Armenian Turk

might have been. The fact of his being Consul General adds nothing to his duties under *this* contract, and leaves the case before this Court precisely as it stood under the prior point (see Point V).

III.

But if the Court is of opinion that there is some confidential relation between the Sultan and the plaintiff in error, growing out of his appointment as Consul General, then we respectfully urge that the act of taking commissions in this case was approved, by the Sultan having autocratic powers. All the considerations urged under Point V, are applicable to this phase of the case. If the plaintiff in error had acted *under instructions* from Turkey in making this contract, he might not be allowed to recover.

DeLama vs. *Haldimand*, 1 Carrington & Paine, 183.

In this case, however, there were no instructions from the government, and he was not acting for it, but on the contrary, he was authorized by it to act for the contractors.

The duties of such a Turkish Consul-General as Mr. Oscanyan was are to be taken for the purposes of this case *from the opening statement, and not from the rules of law, international or otherwise, prescribing the duties of persons of that class.*

The Circuit Judge in his opinion at folio 25, assumes that the plaintiff in error was a "public officer of the government of Turkey." This assumption is, however, in direct opposition to the opening statement, which at folio 39 discloses the fact that the office was an honorary one. It is also stated at folio 65 that the office was *created* at New York, as an honor to be conferred upon the plaintiff in error. Again, at folio 66, the office is described as an "honorary one," and so without duties. The whole drift of the statement (folios 64–67,) as well at at folio 39, is that the name "Consul General" was a mere title—*magni nominis umbra.*

IV.

But even if he were truly a Consul-General, there is nothing in the principles of law, applicable to such officers, to render him incapable of entering into such a transaction, as the present.

A consul is a commercial agent of his government, with fluctuating duties. Each government may have a policy of its own as to the amount of services required of him, the mode of compensation, and his disability to engage in commercial enterprises, whether the government be or be not concerned.

It is not for the Courts of the United States to dictate to other governments their policy, or to say that a system which they have preferred to adopt shall not be enforced, because it is contrary to our theories of public morals. This government cannot on such matters of purely positive law make itself an arbiter of morals for the rest of mankind.

The practice of our own government as to consuls is in accordance with these views.

Ordinarily a consul is clothed with authority only for *commercial* purposes.

The Anne, 3 Wheaton, 435.

By Revised Statutes of United States, § 1690, consuls are classified into two principal classes, as indicated by Schedules B and C. There are other officers of this kind not scheduled, § 1700. This division is purely arbitrary, according to the opinion of Congress as to the relative importance of the business at the foreign ports, where the consuls may be. By §§ 1699, 1700 the officers in schedule B are not allowed to be interested in or to transact business as merchants, brokers or factors within the port, place or limits of their consulates. There is no such general prohibition as to those embraced in Schedule C, though the President of the United States may extend the prohibition to those persons. See also United States Consular Regulations, pp. 19, 20.

All this legislation proceeds upon the principle, that the duties of consuls may vary and more or less stringent rules may be adopted as to trade, depending on the nature of the case. The whole matter is thus relegated to the domain of positive law.

A state may, accordingly, without any violation of morality, create a Consul General as a purely honorary office without any duties or confidential relations to itself.

This, Turkey has done in the present case, as the opening shows.

The authorities in International Law agree with this view. They

maintain with uniformity, that the consul's duties, whether consul-general or consul, are purely commercial, concerning in the main navigation and external commerce.

1 *Kents Comm.*, 42.
1 *Calvo's Int. Law*, 2*d. ed. p.* 588, 616.
2 *Phillimore Int. Law*, 239, 246.

They also show, that recourse must be had to the local law as well as to treaties to determine in each case, what the powers of a consul may be and it is only in the absence of such regulations, that the rules of international law have application. Thus it is said by Calvo :

"In the majority of states, the consular hierarchy contains the following degrees: Consul-General, Consuls, Vice-Consuls, Consular or Commercial agents. This classification has only a relative value; the only thing of importance to any government is, that the foreign or consular agent arriving upon its territory, justifies in due form the legitimacy of his nomination and the extent of his powers *without reference to the title by which he is designated.* Calvo's Int. Law, 2d ed. Paris 1870, p. 588," and again :

"The special duties inherent in the character of consuls, in other words, the nature and extent of the powers, which each state confers in an administrative point of view, do not enter directly into the domain of international law. These powers and duties are governed in principle by the *laws or particular rules of the country to which the consul belongs or from which he is delegated*, and they are sanctioned in practice partly by clauses of treaties and partly by traditional usages, which vary little from one country to another. He then proceeds to define p. 616, 617, the usual powers of a consul, none of which include the case at bar. "A consul has a general vigilance over the interests of the shipping and navigation of his country." 2 *Phillimore Int. Law* 239. And again: "As a general rule, and in the absence of any treaty upon the subject, the consul looks for his authority and functions to the diplomatic instrument, by which he is appointed to his office, to the exequatur, which empowers him to exercise them and to any modification, which the particular law or custom of the country in which he is placed, may apply to them (citing 1 *De Martens Law of Nations*, 260–5) and he must always remember that the

principal end and object of the consulate is to protect the external commerce and the national navigation of his own country."

2 *Phillimore Int. Law*, 246.

Moreover, the contract in the present case is a military one. It was entrusted solely to the military authorities (fols. 43, 45). Rustem Bey was acting as a subordinate of the Minister of Ordnance. With these functions a consul plainly has nothing to do.

No stress should be laid on the fact, that in the letters from Winchester to Oscanyan (fols. 50, 60, 61 and 62), the latter is addressed by his official title. This is not evidence against the plaintiff in error. He is not bound by the acts of Winchester. Nor do these letters show that the original contract was with Oscanyan, in his official capacity. What they do show is, that after the plaintiff in error had performed his part of the contract—had presented the arms to and induced the recommendation of Rustem Bey, and after a contract was about to be made by the Turkish Government with the defendant, which was thus commencing to reap the fruits of Oscanyan's labor, Winchester seeks to skulk out of his part of the bargain, and manufacture evidence for himself to show, that Oscanyan was the agent of the Ottoman Government in these transactions (fols. 50–62, 68).

The reply of the plaintiff in error, on the other hand, in which he signs himself simply "Oscanyan" shows the true situation of affairs at that time (fol. 63). Even by the most violent construction, there is nothing in the letter against its writer.

Point VII.

A final consideration, which we would press upon the attention of the Court, is this:

The facts in *Tool Company* v. *Norris*, do not require so broad and comprehensive a rule as is laid down in the head note. The case may well be sustained on the plain evidence of an employment for improper purposes.

The New York cases are distinct and emphatic in the statement that the employment of a broker, for a commission, to negotiate a

contract with the Government, and, *a fortiori*, in the present case, is not illegal in itself, but only where special facts are proved.

The ends of justice require, unless where there is strong reason to the contrary, that the State and National Courts should be in harmony, so that justice may not merely be a matter of tribunals but may be administered with uniformity.

Point VIII.

The judgment of the Court below should be reversed and a new trial ordered.

Respectfully submitted.

THEODORE W. DWIGHT,
RICHARD O'GORMAN,
Senior Counsel for Plaintiff in Error.

HERMON H. SHOOK,
Junior Counsel.

BRIEF FOR DEFENDANT IN ERROR.

SUPREME COURT

OF THE UNITED STATES.

No. 262.

CHRISTOPHER OSCANYAN,

Plaintiff in Error,

vs.

THE WINCHESTER REPEATING ARMS COMPANY,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

ARTHUR G. SEDGWICK,
EDMUND RANDOLPH ROBINSON,
Of Counsel for Defendant in Error.

UNITED STATES SUPREME COURT,

October Term, 1880.

CHRISTOPHER OSCANYAN,
Plaintiff in Error,

vs.

THE WINCHESTER REPEATING ARMS COMPANY,
Defendant in Error.

Brief for Defendant in Error.

STATEMENT.

This is a writ of error to the Circuit Court of the United States for the Southern District of New York. The action was one of assumpsit, brought to recover $136,000 as broker's commissions on sales of arms alleged to have been made to the Turkish Government through the plaintiff's agency. The defence was the general issue. When the case came on for trial below, immediately after plaintiff's opening, counsel for defendant moved the Court to direct a verdict for defendant on the ground that, upon the facts stated in the opening as true, plaintiff had, as a matter of law, no cause of action. The record shows that the material facts stated by the plaintiff's counsel in his opening as constituting the basis of his cause of action were substantially as follows:

The plaintiff is Christopher Oscanyan, an Armenian Turk by birth, but a Christian by faith. The defendant is a corporation chartered under the laws of Connecticut. During the period of the transactions out of which this case arose he was Consul-General of the Imperial Ottoman Government at the port of New York, and the only representative of his government of that rank in this country. The plaintiff came to this country at the age of sixteen; was educated at New York University, where he was graduated with high honors. He made himself a master of English and many other languages, and is an accomplished, versatile and learned scholar. The office of Consul-General at New York was created as an honor and distinction to him, and since his retirement has been abolished. The emoluments of the position came from fees, there being no salary attached to it. The sales on which the action is based are alleged to have been made through Rustem Bey, an official in the Turkish service, and a personal friend of Oscanyan's. From their earliest years they

had been on very intimate relations, and their friendship was very close. In the year 1869 Rustem Bey was sent to the United States to examine and report in regard to the purchase of arms and machinery for his government. The first step taken by him in the discharge of his duties was to make his headquarters at the office of the plaintiff, and all the various manufacturers of arms and ammunitions throughout the United States, "knowing that his headquarters would be at the office of Oscanyan," * * * "immediately commenced a correspondence with him (the plaintiff), and he was waited upon by large numbers of these manufacturers in order to secure his influence in presenting the claims of their arms to Rustem Bey when he arrived." Rustem Bey was unacquainted with the English language, but could converse in French. The plaintiff was familiar with both, and this, of course, increased his already great influence with Rustem. It was a natural, but very important consequence of this fact, that "all of the transactions between the Turkish Government represented by Rustem Bey and the manufacturers were transacted through the plaintiff." (Record, fols. 36-40.)

The introduction of the President of the defendant corporation, Mr. O. F. Winchester, in June, 1869, to Rustem Bey, was by the plaintiff; and it was at this time that Oscanyan, on being asked to call the attention of Rustem Bey to the defendant's repeating rifle, laid the foundation for the claim in the suit at bar by this significant language: "*I am receiving commissions from all parties for that favor, and I expect commissions for my services; and that is one of the ways by which I make my livelihood. If you can compensate me, if you can remunerate me, by giving me commissions, I will use my influence for you and do all I can for you.*" (Record, fol. 41.) To this proposition Winchester replied, "Very well, that is all right. You shall have whatever commissions we deem proper, and we will talk the matter over and agree upon that." At first Rustem Bey was not favorably impressed with the repeating rifle of the defendant corporation. He was disinclined even to examine it, but Oscanyan succeeded, by the use of his influence, in getting him to put it in with other samples shipped to the Turkish Government. (Record, fol. 42.) In January, 1870, Rustem received instructions from Halil Pasha, the Turkish Minister of Ordnance, to examine and report upon the Spencer gun, a totally different arm, on sales of which Oscanyan supposed he could get no commissions. These instructions immediately became known to Oscanyan, who "*at once proceeded to use his influence with Rustem Bey to get Rustem Bey to condemn the Spencer gun.*" (Record, fol. 45.) He "*raised all manner of objections that he could, and he finally did succeed in inducing Rustem Bey to put aside the Spencer rifle.*" He then "*brought out a Winchester rifle, a sample of which he always kept in his office for the very purpose, whenever opportunity offered, of presenting this claim to Rustem Bey.*" (Record, fol. 45.) Rustem

Bey never liked the gun, but by the persistent use of his influence plaintiff succeeded in getting him to recommend the purchase of a thousand for the Imperial bodyguard. *This was done not because the arm was a good one, but in order to please Oscanyan, and in order to help him to his commissions.*

This appears still more clearly from the conversations alleged to have taken place between Oscanyan and Winchester after the condemnation of the Spencer gun. When the latter expressed regret at this, on the ground that he could have furnished such guns himself, Oscanyan explained to him that the United States Government had a large number of those guns on hand, which the Turkish Government would have ordered directly from the United States if it had not been condemned. (Record, fol. 47.)

On February 30th, 1870, Rustem received fresh instructions to inquire and report upon the price of 20,000 repeating arms, and to send fresh samples. Oscanyan immediately telegraphed to Winchester, and on the following day Winchester arrived at the office of Oscanyan, where, as plaintiff's counsel remarked incidentally, "almost all of the contracts" were "consummated and drawn up upon the paper of Mr. Oscanyan." Oscanyan, on meeting Winchester, grasped him warmly by the hand, and said that he had got an order or enquiry for the price of 20,000, and thought that he could get an order for 100,000. In the conversation which ensued, Oscanyan called the attention of Winchester to the fact that Rustem had raised a new objection to the rifle, relating to the spring of the magazine, and advised him to meet it. This advice was subsequently acted upon. Immediately after this interview the agreement between Oscanyan and Winchester with regard to commissions was put in writing as follows:

"NEW HAVEN, Conn., March 4th, 1870.

"OSCANYAN, Ottoman Consul-Gen.:

"*My Dear Sir*—In accordance with my promise, I now pro-
" ceed to put in writing the agreement or promise I made to you,
" namely:

"I hereby promise to pay to you a commission of ten per cent.
" upon all sales of arms of our company made to or by you
" to the Ottoman Government, provided only that such sale is
" made at prices and upon terms that shall have our approbation
" or be authorized by me.

"I am very truly yours,

"O. F. WINCHESTER,

"*President W. R. Arms Co.*

"P. S.—The commission on the Spencer arms will be the
" same as on our arms." (Record, fols. 49–50.)

On March 5, 1870, Rustem having forwarded his report to the Turkish Government, a fresh box of samples was sent to Halil Pasha. This box arrived at Constantinople April 18, 1870, and

upon being taken to the palace the Sultan issued his order that twenty thousand guns should be purchased, subject to the trial of the samples. The trial, however, had become impossible, owing to the fact that no cartridges had been sent, on account of a statute of the United States which prohibited the shipping of ammunition on ocean steamers. The news of this difficulty having been received in this country, Winchester endeavored to overcome it by telegraphing, or saying that he would telegraph, for cartridges from Berne, Switzerland. The cartridges, however, were not, in fact, sent. Rustem Bey became excited, as he had condemned the Spencer gun through the plaintiff's influence, and feared a reprimand from his government. The plaintiff endeavored to appease him and went to Winchester, who then said there were no cartridges in Berne. The plaintiff returned to Rustem Bey, who became enraged and said he never liked Winchester's looks, but was finally pacified by Oscanyan. At length it was agreed, at the plaintiff's suggestion, that cartridges should be sent to Turkey in a sailing vessel, and they were so sent. The trial was had at Constantinople, on their arrival, with a favorable result. On November 9, 1870, a written contract was entered into by the defendant with the Turkish Government for arms to the amount of five hundred and twenty thousand dollars, and on August 19, 1871, another contract was entered into for the purchase of arms from the defendant to the amount of eight hundred and forty thousand dollars.

The letter of March 4th, as also that of July 15, 1870, and "almost all the letters" written by the defendant to the plaintiff, were addressed to him in his official capacity, and his counsel also stated, in opening the case, that "*from the very time when the arms were presented to Rustem Bey down to the time when the trial, as we shall show, had taken place, and down to the time when the purchase was made, nobody had any influence whatever in inducing that sale except the plaintiff in this case.*" (Record, fol. 51.) It also appears that Rustem Bey knew of the agreement between Oscanyan and Winchester.

Upon this opening the learned Court below directed a verdict for the defendant, upon the ground that the alleged contract with the plaintiff for the payment of commissions to him upon sales made to the government of which he was an officer and trusted adviser, by the exercise and through the means of his great influence with the purchasing agent of that government, was void, as being corrupt in itself and prohibited by morality and public policy.

POINTS.

I.

The plaintiff in error will probably raise, as a preliminary objection to the decision of the Court below, that the defence of the illegality or immorality of the consideration of the alleged contract was not pleaded by the defendant; that the invalidity of the contract on these grounds is exclusively a matter of defense; that by the Code of Procedure of New York such defense must be specially set forth, and if neglected or waived by the defendant in his answer, is not to be regarded by the Court. The opinion of the learned Court below, however, fully disposes of this objection. At common law, under the general issue in actions of *assumpsit*, the defendant could safely rely upon the defence that the contract sued upon was illegal in its inception, and as common law pleadings were, as a matter of fact, used by both parties to the suit without objection, under the system prevailing in the Court below at the time of the commencement of this action, and prior to the decision of Lewis *v.* Gould, 13 Blatchford, 216 (Dec. 1875), the defendant should, if necessary, have the right to amend his plea so as to have the benefit of a defence which goes to the merits, and is not merely technical.

See cases cited in Opinion of Shipman, *J.*, Record, fol. 31, but there incorrectly printed. 1 Chitty's Pleading, 16th Am. Ed., p. 493*, notes r^1, r^2. Gould's Pleadings, Ch. VI., Sec. 47. Stephen Pleading, 162 n. Craig *v.* Missouri, 4 Peters, 410. Andrews *v.* Pond, 13 Pet., 65, 80. Wilt *v.* Ogden, 13 John., 56. Edson *v.* Weston, 7 Cow., 278. Young *v.* Rummell, 2 Hill, 478.

In this connection it is proper, also, to refer to the language of this Court in construing the Act of Congress of June 1, 1872 (17 Stat., 197, Sec. 5), "that the practice, pleadings and forms and modes of proceeding in other than equity and admiralty causes, in the Circuit and District Courts of the United States, shall conform, *as near as may be*," to the same things "existing at the time in like causes in the Courts of Record of the State within which such Circuit or District Courts are held."

Ind. & St. Louis R. R. Co. *v.* Horst, 93 U. S., 291, 300.

"The conformity is required to be "as near as may be,"—not as near as may be *possible, or as may be practicable.* This indefiniteness may have been suggested by a purpose. It devolved upon the Judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they

would do, any subordinate provision in such State statutes *which in their judgment would unwisely encumber the administration of the law or tend to defeat the ends of justice in their tribunals.* While the Act of Congress is, to a large extent, mandatory, it is also, to some extent, only directory and advisory" (p. 501). And to the same general point that the Act has never been construed without a large discretion,

See Newcomb *v.* Wood, 97 U. S., 581.

In this, as in the preceding case, it was held that the Act did not affect the rule prevailing in the Federal Courts that granting motions for new trials are discretionary.

The Court below having permitted the amendment, the plea must, on appeal, be treated as amended so as to give the defendant the benefit of the defense.

Opinion of Shipman, *J.* (Record, fol. 31).

U. S. R. S., § 954, provides that any Court of the United States "may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it "shall, in its discretion and by its rules, prescribe." No rules of Court having been made on the subject, the matter is entirely discretionary, and it would be difficult to suggest a case in which a discretionary right to permit amendments could be more advantageously exercised than in this.

But the question does not depend upon rules of pleading. The objection is one which it is the duty of the Court itself to raise in the interest of sound morals and the due administration of justice. And this duty would not be in any manner affected, even by an express stipulation on the part of the defendant to waive the objection; still less by an implication that he intends to waive it, derived by the Court from his omission to plead it specially.

Coppell *v.* Hall, 7 Wallace, 542.

In that case Coppell, the acting British Consul at New Orleans, sued Hall, a citizen of Louisiana, for breach of a contract made during the late civil war, by which Coppell agreed to cause certain cotton to be *protected* and transported to New Orleans, and there disposed of to the best advantage, Coppell to retain one-third of the profits of the contract as his compensation. The defendant, Hall, set up that the contract was against public policy; but also set up a reconventional demand or counter-claim for damages for breach of the same contract by Coppell.

The Court said (p. 552): "The instruction given to the jury "that if the contract was illegal, the illegality had been waived

" by the reconventional demand of the defendants, was founded " upon a misconception of the law. In such cases there can be " no waiver. The defence is allowed, not for the sake of the de- " fendant, but of the law itself. The principle is indispensable " to the purity of its administration. It will not enforce what it " has forbidden and denounced. The maxim, *ex dolo malo non* " *oritur actio*, is limited by no such qualification. The proposi- " tion to the contrary strikes us as hardly worthy of serious " refutation. Whenever the illegality appears, whether the evi- " dence comes from one side or the other, the disclosure is fatal " to the case. No consent of the defendant can neutralize its " effect. A stipulation in the most solemn form to waive the " objection would be tainted with the vice of the original con- " tract, and void for the same reasons. Wherever the contami- " nation reaches it destroys. The principle to be extracted from " all the cases is, that the law will not lend its support to a claim " founded upon its violation."

The rule prevailing under the New York and other modern Codes of Procedure, that a defence which is not set up is waived, has consequently no application here. The fou ndation of the rule is the necessity of guarding against surprise and giving the plaintiff an opportunity to meet the whole of the defendant's case. Consequently, when the defendant proposes to rely upon the usurious character of the contract sued upon, or upon the fact that it is a gaming contract, or in violation of the prohibition of some statute, he is required to apprize the plaintiff of his intention.

(Codd *v.* Rathbone, 19 N. Y., 37. Morford *v.* Davis, 28 N. Y., 481. McKyring *v.* Bull, 16 N. Y., 297. N. Y. Central Ins. Co. *v.* Nat'l Protection Ins. Co., 20 Barb., 468, 473. Kelsey *v.* Western, 2 Comst., 500, 506.)

This is because the illegality is of the nature of *malum prohibitum*, which the defendant may waive if he pleases, and his omission to set it up is held tantamount to a waiver. But when the illegality consists of that which is *malum in se*, a violation of the moral law which the plaintiff himself discloses, and which cannot be waived by the defendant because the cause of action into which it enters is so base and corrupt that the very principles upon which justice is administered forbid its recognition by courts of justice, the reason of the rule ceases. No case can be found in the State of New York where the rule that under the Code a defence is waived which is not set up by the answer has been applied to permit a plaintiff to recover upon a contract confessedly founded upon bad faith and corruption. Take the case of a prostitute suing for the wages of prostitution, under a common count for services; would any court enforce such a contract when its nature appeared, because the answer did not aver that the contract was *contra bonos mores?* In such a case the court leaves the parties where it finds them.

II.

The rules of law applied by this Court to contracts like that in question are as well settled as they are stringent.

The leading cases on the subject are: Tool Company *v.* Norris, 2 Wallace, 45; Trist *v.* Child, 21 Wallace, 441, and McGuire *v.* Corwine, 11 Otto, 108. In the first of these cases this Court held an agreement for the compensation of plaintiff for work in procuring a contract from the War Department for the sale of arms to be *contra bonos mores.* Mr. Justice Field said:

"The question then is this: Can an agreement for compensa-
"tion to procure a contract from the Government to furnish its
"supplies be enforced by the courts? We have no hesitation
"in answering the question in the negative. * * * Con-
"siderations as to the most efficient and economical mode of
"meeting the public wants should alone control in this re-
"spect the action of every department of government. No
"other consideration can lawfully enter into the transaction, so
"far as the government is concerned. Such is the rule of public
"policy, and whatever tends to introduce any other elements
"into the transaction is against public policy. That agree-
"ments like the one under consideration have this tendency is
"manifest. They tend to introduce personal solicitation and
"personal influence as elements in the procurement of contracts,
"and thus directly lead to inefficiency in the public service and
"to unnecessary expenditures of the public funds. * * * All
"agreements for pecuniary considerations to control the busi-
"ness operations of the government or the regular administra-
"tion of justice, or the appointment to public offices, or the
"ordinary course of legislation, are void as against public policy,
"without reference to the question whether improper means are
"contemplated or used in their execution. The law looks to the
"general tendency of such agreements, and it closes the door of
"temptation by refusing them recognition in any of the courts
"of the country."

In the second case the plaintiff in error employed the defendant in error to get a bill passed by Congress for an appropriation to pay a claim against the United States. It was not intimated that any corrupt means were used or were intended to be used. The Court said: "Was the contract a valid one? It was on the
"part of Childs to procure by lobby service, if possible, the pas-
"sage of a bill providing for the payment of the claim. * * *
"We entertain no doubt that in such cases * * * an agree-
"ment, express or implied, for *purely professional services*, is
"valid. * * * But such services are separated by a broad
"line of demarkation from personal solicitation and the other

"means and appliances which the correspondence shows were "resorted to in this case. There is no reason to believe that they "involved anything corrupt or different from what is usually "practiced by all paid lobbyists in the prosecution of their busi- "ness. * * * The theory of our government is, that all "public stations are trusts, and that those clothed with them "are to be animated in the discharge of their duties solely by "considerations of right, justice and the public good. * * * "The agreement in the present case was for the sale of the in- "fluence and exertions of the lobby agent to bring about the "passage of a law for the payment of a private claim, without "reference to its merits, by means which, if not corrupt, were "illegitimate, and, considered in connection with the pecuniary "interest of the agent at stake (a contingent fee), contrary to "the plainest principles of public policy. No one has a right, "under such circumstances, to put himself in a position of tempt- "ation to do what is regarded as so pernicious in its character. "The law forbids the inchoate step and puts the seal of its "reprobation upon the undertaking. * * * It is by reason of "these things that the law is as it is upon the subject. It will "not allow either party to be led into temptation where the "thing to be guarded against is so deleterious to public morals "and so injurious to the public welfare." In this case profes- sional services of a perfectly proper character had been incident- ally rendered, yet the Court held that since these were blended and mingled with the improper services, there could be no re- covery even to that extent. "That which is bad destroys that "which is good, and they perish together" (p. 452).

In Mills *v.* Mills, 40 N. Y., 543, the Court of Appeals of New York lay down precisely the same rules. The defendant agreed to transfer land to the plaintiff if he would use his utmost in- fluence to get a bill through the Legislature granting certain franchises to the defendant. Hunt, *C. J.*, said: "This contract is "void as against public policy. It is a contract leading to "secret, improper and corrupt tampering with legislative action. "* * * It is not necessary to adjudge that the parties stipu- "lated for corrupt action, or that they intended that secret and "improper resorts should be had. It is enough that the contract "tends directly to these results. It furnishes a temptation to "the plaintiff to resort to corrupt means or improper devices to "influence legislative action. It tends to subject the Legislature "to influences destructive of its character, and fatal to public "confidence in its action."

In Meguire *v.* Corwine, 101 U. S., 108, at the last October Term of this Court, the principles of these decisions were emphatically approved, and applied to the case of an agreement to pay the plaintiff half of the fees which the defendant might receive as government counsel in consideration of the plaintiff's procuring defendant's appointment as such counsel. The Court said: "It cannot "be necessary to go over the same ground again. To do so would "be a waste of time."

In Fuller *v.* Dame, 18 Pick., 472, the Supreme Court of Massachusetts asserted the same doctrine, extending it to the case of *a private corporation.* The plaintiff was a stockholder in the Boston and Worcester Railroad Co. The defendant owned some land on which he desired to have one of the company's depots erected. The defendant promised plaintiff a sum of money if he would procure the erection of a depot on that spot. Plaintiff at the time believed that this was the best location for the depot. A company was formed which purchased the land and gave it to the railroad, under an agreement that it should locate its depot there, and plaintiff became a stockholder in this company. Shaw, *C. J.*, said: "The law goes further than merely to "annul the contract where the obvious and avowed purpose is "to do or cause the doing of unlawful acts. *It avoids contracts* "*and promises made with a view to place one under wrong in-* "*fluences, those which offer him a temptation to do that which* "*may injuriously affect the rights and interests of third persons.* "* * * If rewards might be taken in consideration of the "exertion of direct or indirect influence, either by the person "acting under it or by others who should be influenced and "moved by him, it would destroy all confidence, it would lead "to false and unfair representations and dealings, and would be "productive of infinite mischief. * * * It is no answer to "say that by the act of incorporation the executive authority "was vested in a board of directors, and Mr. Fuller was not a "director. He was a member of the company and might be "chosen a director. He was an elector of the directors, and they "were directly responsible to the stockholders." The decision of this Court was expressly rested on the ground that "the ob-"ject, tendency and effect of this contract was to induce the "promisee, or other persons to be employed and called into action "by him, to exert an influence upon the decision of questions "affecting both public and private rights, with a view to con-"siderations other than those affecting those rights" (p. 479).

One of the earliest English cases on this subject was Norman *v.* Cole, 3 Esp., 253, which was assumpsit for money had and

received, to recover thirty pounds deposited with the defendant to be applied for the purpose of procuring a pardon for a third person. After the opening of the plaintiffs' case, Lord Eldon stated that he doubted whether the action was maintainable, and said that he would hold the plaintiff to a very strict proof of the means used to procure the pardon, and called upon counsel to show the grounds on which they expected to recover. They then stated that the convict was a man of good character before conviction, and that the money was to have been given to one M., a person having good connections and access to persons of influence, for urging the case of the convict. Lord Eldon said: "I cannot "suffer this case to proceed. I am of opinion this action is not "maintainable. Where a person interposes his interest and "good offices to procure a pardon, it ought to be done gratui- "tously, and not for money." And the plaintiff was thereupon nonsuited.

These cases establish the proposition that for reasons of public policy, and for the sake of public morals, all agreements which have a tendency to bring to bear improper and corrupt influences upon the decision of questions affecting either public or private right, are *ipso facto* void, without reference to the question whether improper and corrupt means are in fact contemplated, or are actually used. The law looks *to the general tendency of agreements of this class*, and therefore declines to permit an inquiry into the nature of the services which were in fact contemplated by the parties, or were actually rendered under the particular agreement.

The Court of Appeals of New York, in its more recent decisions, has declined to go to the full extent of this proposition, and has held, in certain cases upon which the appellant will rely, that where a person is prepared to enter into a contract with the Government, or has property which he desires to sell to the Government, and it is a matter of open traffic between such person and the Government, he may make a contract with *a private individual holding no official relation to the Government* to compensate him for services in procuring such contract, or disposing of such property, provided such contract does not in terms stipulate for the use of improper influence, and it is not shown as a matter of fact that improper influence was contemplated or actually used. That is to say, *that when the agent employed has no official relation or duty to the other contracting party—the Government*—it is necessary, in order to invalidate the con-

tract, either that a corrupt intent should appear in the contract itself, or should be shown by evidence *dehors* the contract.

Lyon *v.* Mitchell, 36 N. Y., 235. Southard *v.* Boyd, 51 N. Y., 177. Cummins *v.* Barkalow, 4 Keyes, 514.

In the first of these cases the action was for commissions upon the sale of vessels to the United States Government. The defendant asked plaintiff if he could sell the vessels. Plaintiff said he did not know. The defendant then suggested that the plaintiff was acquainted with the Republican members of the administration, upon which the plaintiff admitted that he knew some, and had friends who could introduce him to others and aid him.

Defendant requested the Judge to charge: "If the jury believe "that the agreement on which this action is brought, in refer- "ence to the influence of the plaintiff or his friends with the "Republican members of the administration, or with any per- "sons connected with the administration, whose duty was to act "in the purchase of steamers, and the percentage, as commis- "sions, was fixed in reference to that influence, the contract is "void."

Held, that the proposition presented the single point that if the plaintiff's influence with the administration was *an inducement* to the contract, then it was void, and that the case must be distinguished from those where the contracts themselves provided for the use of influence to procure legislative or executive action. The Court decided that personal solicitation of legislators, Judges, the President, the Governor, or heads of departments, is not the lawful subject of contract; but that where property is offered for sale to the Government, and an agent is appointed to negotiate the sale, and there is no concealment of the agency, it becomes a matter of open dealing; that an agreement for a contingent compensation to such agent is lawful, and that it does not affect the validity of such agreement that the *inducement to it* was the influence of the agent with the members of the administration whose duty it was to act in the purchase of steamers. "An agent of the same political party with "the Executive or the heads of departments, having acquaint- "ances and a reputation which would enable him to make an "advantageous presentation of his merchandise, may, in my "opinion, be lawfully employed to make such sale, and with "reference to those qualifications. The decision in Norris *v.* "The Tool Co., 2 Wallace, 45, confounds a sale or traffic openly "made by an avowed agent to a party wishing to purchase, "with the forbidden case of an interference with legislative "action or executive clemency, where the party does not profess "to act upon commercial principles."

In the second of the above cases it was held that a contract to pay a commission to plaintiffs for chartering a vessel to agents of the Government was a valid contract, and that its validity was not affected by the fact that the plaintiffs were related to such Government agents. The Court said: "It is true that one "of the plaintiffs was a son and that another was a son-in-law "of one of the Government agents whose business it was to "select the vessels for the Government, and the plaintiff possi- "bly had facilities for chartering vessels which others did not "have. But the plaintiffs did not contract to do an illegal ser- "vice. They did not agree to use any corrupt means to procure "the charter. The fact that the plaintiffs had intimate relations "with the Government agents, and could probably, therefore, "influence their action much more readily than others, did not "forbid their employment."

The third of the above cases was upon an agreement to pay plaintiff's assignor a portion of the profits on a contract for the sale of arms to the Government in consideration of his past services in having procured the contract. The Court say of the agreement: "It demanded the use of no improper influence; it was a simple "promise in consideration of services previously rendered by "Halderman, which were entirely legitimate, to account for a "certain share of the profit ultimately realized; it contained "within itself no illegal or corrupt element which stamped it as "vicious and incapable of enforcement, and no proof was given "to show that it was thus tainted before it was executed."

The above cases are not law in this Court. The Court of Appeals of New York, in the distinction first taken in Lyon *v.* Mitchell, and followed in the later cases, was forced to disclaim the lofty morality announced by this Court in Tool Company *v.* Norris, as being inconvenient and impracticable in commercial dealings between citizens and departments of the Government. The same supposed disadvantages and hardships to the claimant or would-be contractor were strenuously urged by eminent counsel upon the attention of this Court in Trist *vs.* Child, but were held to be overbalanced by the far broader and weightier considerations of public good in preserving intact the safeguards to pure government and sound morals. The law will not allow, says Mr. Justice Swayne, in delivering the unanimous opinion of this Court, "*will not allow either party to be led into temptation where the thing to be guarded against is so deleterious to the public morals and so injurious to the public welfare.*"

But even the cases decided by the New York Court of Appeals would, as the learned Judge in his opinion below observed, be

very far from validating any such contract as that here sued on. The contract in this case is an agreement made *not with a private agent* for his services in effecting a contract with a department of his Government, *but with the official representative of that very Government* for the avowed use and sale of his influence with that Government. As clearly stated by the Court below, it was "a purchase and sale of the plaintiff's official influence as an officer of the Turkish Government, and as the manager of the business transactions of Rustem Bey with American manufacturers, and the purchase and sale of the personal influence of the plaintiff over Rustem Bey, who was a stranger to our language and upon our soil, and the transaction was an active and controlling exercise of this influence for the benefit of the defendant in causing the rejection of arms the purchase of which, it was supposed, would not enure to the defendant's benefit, and in causing the purchase of the defendant's arms by the Turkish Government." (Record, fol. 24.) Such a contract is not only corrupt in tendency, but it is corrupt in fact. It comes within the category of contracts which are *mala in se.* Its prohibition is derived from the eternal, immutable law of good and evil, which "is binding over all the globe, in all countries and at all times. No human laws are of any validity if contrary to this." (1 Blackstone's Commentaries, p. 41.) Had the learned counsel desired, in his opening, to present a vivid picture of an inherently corrupt agreement to obtain a government contract, he could not have done it more effectively than in stating what he imagined to be his cause of action. The plaintiff, he says, at the very outset, is the official representative of the government which was induced to buy. He holds an appointment from that government of peculiar dignity and distinction. He is the Consul-General of the Ottoman Empire for the United States of America, and the only person who has ever held that high office. He is the intimate personal friend of its purchasing agent, Rustem Bey. In consequence of the purchasing agent's ignorance of our language, he is the indispensable means of communication between the purchasing agent and the would-be vendors. The defendant, he urges, in attempting to magnify his client's claim, is an American corporation, whose only means of access to the plaintiff's government is through the plaintiff, as its consul and official representative. The office which the plaintiff occupies as the official representative of his government—its Consulate—is the headquarters of the purchasing agent and the place where his negotiations are carried on. Contracts made by the agent for the purchase of arms are engrossed upon the plaintiff's official paper. The conduct of the plaintiff is not mere acquiescence in an offer to pay him commissions. He insists from the very outset that if any sale is to be effected, an enormous toll must be paid to him. Finally, this Consul-General—this official representative—not

only urges the purchase of the arms on which he is promised a commission, but secures the rejection of other arms upon which he feared he should get no commission, not because those arms are supposed by him to be unfit for his government's use, but because of his own pecuniary interest in their rejection.

It is within the knowledge of this Court that for services of the character avowed and extolled in the opening for the plaintiff, an equally eminent man, the late Consul-General of France in the United States, M. Victor Place, who, like the plaintiff, was a skilled linguist and an accomplished scholar, was condemned by the courts of his country to penal servitude as a felon.

III.

Confronted with the long array of decisions in which the principles relied upon by us have been laid down, the plaintiff's counsel below was compelled to admit that had such a contract as the one in question been entered into by a consul or other official *of the United States*, for the payment to him of commissions on a sale of arms to the United States, it would have been wholly void. To extricate himself from the position in which this concession placed him, he suggested in his argument in opposition to our motion that inasmuch as the plaintiff was an officer *of a foreign government*, the Court could not presume that that government had the same principles of public policy or morals as our own, and therefore that the plaintiff ought not to be bound, even in our own courts, by those prevailing here. He suggested in his argument that in Turkey such contracts as these were regarded as not open to objection; that in Turkey the doctrine of Trist *v.* Child is reversed, the theory prevailing that public stations are not trusts, but private property; that those clothed with them are supposed to be animated in the discharge of their duties, not by considerations of right, justice, and the public good, but by those of private interest and profit. It might be enough to say, with the learned Judge who decided the case below, that we are not aware that Turkey has laid down any different rule for the guidance of persons whom it has charged with the exercise of public trusts upon foreign soil from that recognized by this tribunal, and that in the absence of proof to the contrary, the presumption is that the law of Turkey in these regards is the same as that of the court in which it was sought to enforce the contract (Chapin *v.* Dobson, 78 N. Y., 74, 79); that, moreover, New York, and not Turkey, was the *lex loci contractus* (Record, fol. 27). But the futility of the suggestion is shown by a variety of other considerations, and first by the fact that the recognition by our courts of any foreign law, custom or principle different from those of

this country, is a matter strictly of comity, and where the foreign law, custom or principle is in contravention of what we deem fundamental principles of morality, justice or public policy, the comity of our courts cannot be invoked.

No nation is bound to enforce or recognize any contract which is injurious to its own interests, policy or morals, or is of pernicious example to its own subjects.

Story's Conflict of Laws, §§ 244, 258.

The law or custom of a foreign country is admitted simply in order that the contract may receive the effect which the parties to it intended. But no State is bound to admit a foreign law even for this purpose when that law is in violation of its own law or policy or what it deems the law of nature or the law of God. This qualification is recognized by the judicial tribunals of England and the United States and is applied to all contracts, which, although valid by the law of the place where they were made, are against the morals or religion or national policy of the country where it is sought to enforce them.

Story Con. Laws, §§ 244, 258. 3 Burge Comm. Colonial and Foreign Law, 779.

Greenwood *v.* Curtis, 6 Mass., 358, is a leading case on this subject. The action was for the price of a cargo of merchandise sold by a South Carolina merchant on the coast of Africa, to be paid for part in slaves and part in money. The slaves were delivered and the suit was for the money. It was held by the majority of the Court that the two parts of the contract could be separated, and that therefore the plaintiff could recover the money. The principle, however, that the public policy and morals of the domestic forum must prevail over all foreign systems of morality or policy was stated with great clearness by the Court. "By the common law, upon principles of national comity, a contract made in a foreign place to be there executed, if valid by the laws of that place, may be a legitimate ground of action in the courts of this State, although such contract may not be valid by our laws, or even may be prohibited to our citizens. * * * This rule is subject to two exceptions. One is, when the commonwealth or its citizens may be injured by giving legal effect to the contract by a judgment in our courts. * * * Another exception is *when the giving of legal effect to the contract would exhibit to the citizens of the State an example pernicious and detestable.*" Sedgwick, J., in the course of an opinion not actually delivered, but printed with the report of the case, said: "It is pertinent to remark that where a contract is immoral, or, as it is more technically termed, *malum in se*, a discussion about any *lex loci* is nugatory. It is only by the comity of nations that an action arising not between subjects of a particular sovereignty,

and without its limits, can be sustained by its courts acting within those limits. * * * But it would be carrying our courtesy too far to enforce the execution of contracts in themselves vicious. No foreign nation can justly require, and no civility demands, that Judges should thus become the panders of iniquity."

In De Sobry *v.* De Laistre, 2 Har. & J., 191, 228, the Court say: "The Court are of opinion that it is a general principle, "which admits of few exceptions, that in construing contracts "made in foreign countries, the Courts are governed by the *lex* "*loci* as to what respects the essence of the contract; that is, the "rights acquired and the obligations created by it. The excep- "tions to construing contracts according to the *lex loci* which at "present occur are—*first*, where by the terms of the contract it is "to be executed in another country. * * * *Secondly, where the* "*contract is contra bonos mores, as for the price of prostitution.* "*Such a contract, though legal in some countries, would not be en-* "*forced in England or in this State.*"

So, in England, a foreign marriage with a deceased wife's sister has been held totally void in England on the ground that, although recognized by foreign countries, it was in the eye of the English law in violation of the commands of morality and religion, and of baneful example.

Brook *v.* Brook, 9 H. L. Cas., 193, 218, 245. See also Union Locomotive & Express Co. *v.* Erie Railway Co., 37 N. J. L., 23. Tatum *v.* Wright, 7 La. Ann., 358.

Story expressly refers to contracts to cheat the public agents of a foreign country, or to defeat the public rights of the people of that country, as being contracts which, even though they might be held valid in the country where they are made, would be held void elsewhere if the dictates of Christian morality or if even natural justice are allowed to have their due force and influence in the administration of international jurisprudence. (Conf. Laws, § 258.)

Therefore, in the case at bar, even if the contract in question had been made in Turkey, and even if it had appeared that the Ottoman Empire, by express legislation, recognized the extraordinary principle that such a contract made by one of its officers was not in contravention of public morality and decency, still the contract could not be enforced in our courts, because it is repugnant to the very principle upon which those courts are founded. When, however, it is considered that the contract was made in New York by a Connecticut corporation with a resident of New York, that it was not to be performed in Turkey, and that the only pretence that the contract has a Turkish character is derived from the fact that the plaintiff was a Turkish official and a Turk by birth, the utter impossibility of giving life or validity to it by indulging in presumptions as to foreign laws and foreign cus-

toms, in their nature abhorrent to our sense of justice and fair dealing, is apparent.

These considerations dispose of any argument to be drawn from the statement in the opening for the plaintiff (fol. 40), that "all of the transactions between the Turkish Government represented by Rustem Bey and the manufacturers (of arms) were transacted through the plaintiff in this action; *and all of those parties invariably, with the exception of the defendant in this action, have paid to Mr. Oscanyan all of the commissions to which he was entitled for his services, which commissions he was permitted and encouraged to take by the Turkish Government and by their authorized agents.*" Of course, if express legislation of the Turkish Empire validating such contracts would not make them otherwise than of pernicious example to our citizens, or justify our courts in enforcing them, it follows that the assent by the officers of the Turkish Government, from the highest to the lowest, to the receipt of commissions by Oscanyan in other cases, would not enable him in our courts to recover commissions in this case. Even if the assent of such officers had been given to the receipt of commissions in this particular case by Oscanyan, the effect of such assent would be to make the officers who gave it accomplices in his corruption, not to relieve the contract of its inherent taint. Behind the wrong done to and the fraud committed upon the Turkish Government is the wrong done to and the fraud committed upon the Turkish people, whose burdens are necessarily increased by contracts obtained by the payment of enormous bribes to their foreign representatives. Surely, the iniquity of the transaction would not be relieved either by the permission of officers of the home government to Oscanyan to take the bribe or by their participation in it.

IV.

Failing in this attempt to validate this corrupt contract, the appellant must be forced to fall back on his last ground: the theory that, as it does not appear in the opening what are the precise functions of a Consul-General of the Ottoman Empire, or what are his precise relations to the government he represents, the Court cannot judicially know the nature of the duties of his office, and cannot assume that they are inconsistent with the receipt of commissions on a government contract.

Under the decision of this Court in Tool Co. *v.* Norris, stated above, the fact that Oscanyan was Consul-General is perhaps immaterial, as the contract would have been *contra bonos mores* even if he had been a private individual having no relations to the contracting government. But, waiving this objection, there is nothing in the suggestion of the appellant, for the con-

clusive reason that the office of Consul is an office known to international law, and consequently to this Court, as a review of its history, drawn from recognized authorities on international law, will show.

The office of Consul dates from the middle ages, when, in most of the important maritime cities of the south of Europe, tribunals of foreign sprang up side by side with those of domestic institution. Those of domestic institution were presided over by judges known as *Juges Consuls* or *Consul Marchands*, those of foreign institution by judges known as *Consuls d'outre mer* or *Consuls à l'etranger*. These latter were persons sent by independent countries (and received by comity) to protect the national commerce, to watch over national interests and privileges, and to adjust disputes in which citizens of their own country might become engaged. The objects of establishing these consulates are said to have been the obtaining a safe place of deposit for merchandise and a jurisdiction within the foreign country and independent of it. Consulates of this sort rapidly extended all over Europe. In the ports of the Baltic and the Mediterranean foreign merchants inhabited particular quarters of the town, subject to the jurisdiction of their Consuls, who were designated by various titles such as governors, protectors, ancients, syndics and so forth. At this time the good faith of treaties was little regarded; Europeans were looked upon as amenable only to the law of their native country. Each nation usually considered its commercial interests as hostile to those of other nations. There were no resident ambassadors and no permanent diplomatic relations between States. Consuls enjoyed the full privileges of the *jus gentium* and all the immunities now accorded to ambassadors. In modern times this is changed by the disappearance among Christian States of many of the attributes of Consuls in early times; but, though shrunk in extent, the jurisdiction is not changed in origin or general character, and the Consul to-day is, as he was in the middle ages, a representative of his State, residing in the foreign country and exercising such jurisdiction with respect to its commercial interests as the doctrines of international law, supplemented in modern times by treaties, give him. It is by virtue of the general principles and usages of international law that the Consul is commissioned and receives recognition as a public agent and commercial representative of his country, and that he also enjoys certain well-settled privileges and exemptions pertaining to his office. He receives a commission from his Sovereign authorizing him to discharge the duties of Consul. The permission of the government of the country to which he is commissioned, called an *exequatur*, is required to enable him to enter upon his functions. He has the privilege of free entry for his furniture and baggage. He is exempt from excise and inland duties and other personal taxes, from political

and military service and from having soldiers quartered upon him. He has the right to place the arms of his country over the door of his residence, to act as counsel for his countrymen, without special authority to institute proceedings in cases where the rights or property of his fellow-citizens are in question, to interpose claims in admiralty for unknown subjects of his nation, to grant passports and have access to the authorities of the State in the absence of the diplomatic representative.

2 Phillimore's International Law, 2d Ed., pp. 258, 265, 268, 269, 270; Lawrence's Wheaton, pp. 423–4 4 and notes, and the various decisions of the Supreme Court of the United States there cited.

Opinions of the Attorney-Generals, Vol. 7, p. 21.

Fynn's British Consul Abroad, 17.

In the Constitution of the United States, Consuls are recognized as officers whose representative character and general functions are known under the law of nations, by the provision which in enumerating the subjects of federal jurisdiction classifies them with ministers and ambassadors.

U. S. Const., Art. 3, sec. 2.

The laws of the United States on the subject of the powers and duties of Consuls are in accordance with the usages of nations, and are not to be construed to the exclusion of other powers and duties, resulting from the nature of the consular appointment under such usages.

Kent's Commentaries, Vol. 1, p. 42, 43.

U. S. R. S., secs. 1707, 1709–1713, 1750, 2853–2855, 4600.

Not only is the office of consul and the general nature of its duties known to this Court through international law and the domestic law of the country, but also through the treaties between the United States and the Ottoman Empire. Of these there are two, one dated May 7, 1830, the other February 5, 1862. The first is called a "Treaty of Commerce and Navigation," and contains the following clause (Art. 2):

"The Sublime Porte may establish Shahbenders (Consuls) in "the United States of America, and the United States may ap- "point their citizens to be Consuls or Vice-Consuls at the com- "mercial places in the dominion of the Sublime Porte where it "shall be found needful to superintend the affairs of commerce. "These Consuls or Vice-Consuls shall be furnished with berats "or firmans; they shall enjoy suitable distinction and shall have "necessary aid and protection."

Public Treaties U. S., p. 583.

Art. IV. provides for the trial of American citizens by the American Minister or Consul.

That courts take judicial notice of the law of nations, and do not require its general doctrines to be proved, is established by so many cases that it is unnecessary here to do more than to refer to *The Scotia*, 14 Wall., 171, and Brown *v.* Piper, 91 U. S., 37.

In Brown *v.* Piper, this Court enumerated various matters of which it would take judicial notice, as follows: "*The law of nations*, the general customs and usages of merchants, the notary's seal, things which must happen according to the laws of nature, the coincidence of the days of the week with those of the month, the meaning of words in the vernacular language, the customary abbreviations of Christian names, the accession of the Chief Magistrate to office and his leaving it. In this country such notice is taken of the appointment of the members of the Cabinet, the election and resignations of Senators, and of the appointment of marshals and sheriffs, but not of their deputies. The Courts of the United States take judicial notice of the ports and waters of the United States where the tide ebbs and flows, of the boundaries of the several States and judicial districts, and of the laws and jurisprudence of the several States in which they exercise jurisdiction. Courts will take notice of whatever is generally known within the limits of their jurisdiction." This list might be largely extended, for it is the boast of the common law, (herein differing from that older system which, under the maxim *quod non in actis non in mundo*, closed its eyes to matters of general notoriety and knowledge, and ignored facts universally known,) that its Courts exercise a wise liberality and discretion in considering those facts as proved which its Judges must know cannot, as a matter of fact, be disproved.

But we need not rely even upon these general principles, for this Court has in a recent case decided that it must take judicial notice of the general nature of the functions of Consuls under the law of nations.

Dainese *v.* Hale, 91 U. S. (1 Otto), 13.

This was an action for the value of certain goods which the defendant, being Consul-General of the United States in Egypt, caused to be attached in a suit between the plaintiff and one Allen. The defendant pleaded that in his official capacity, by the law of nations and the laws of the United States, he was vested with judicial functions and power over United States citizens in Egypt, and in the exercise of these functions took cognizance of the cause referred to and issued the attachment complained of. The plaintiff demurred, thus raising the question whether the Court would take judicial notice of the fact that he had jurisdiction in his official capacity sufficient to be an answer to the suit. The Court declined to take notice of this special power, as it depended not only upon international law and upon treaties, but upon special laws and usages of Turkey, but at the same time distinctly intimated that if it had

been a mere question of the existence or non-existence of *some* jurisdiction in the Consul they would have taken notice of the general fact. The Court said, "The defendant, by his plea, asked the Court to take judicial notice that his official character gave him the jurisdiction which he assumed to exercise. Could the Court do this? Can this Court do it? It cannot be contended that every Consul, by virtue of his office, has power to exercise the judicial functions claimed by the defendant. * * * Historically, it is undoubtedly true * * * that the Consul was originally an officer of large judicial as well as commercial powers, exercising entire municipal authority over his countrymen in the country to which he was accredited. But the changed circumstances of Europe and the prevalence of civil order in the several Christian States have had the effect of greatly modifying the powers of the consular office; and it may now be considered as generally true that for *any judicial powers* which may be vested in the consuls accredited to any nation we must look to the express provisions of the treaties entered into with that nation and to the laws of the states which the Consul represents. * * * *The general fact that public Ministers and Consuls of Christian States in Turkey exercise jurisdiction in civil matters between their fellow citizens or subjects might be assumed as sufficiently attested by the works on international law and the acts and instructions of our own Government.* But the precise extent of this jurisdiction is unknown to us. * * * As the power of the Consuls of the United States, according to the treaties and laws as they stood in 1864, depended on the laws or usages of Turkey, those laws or usages should have been pleaded in some manner, however briefly, so that the Court could have seen that the case was within them."

So, in Church *v.* Hubbart, 2 Cranch, 186, the action was on a policy of insurance. The vessel had been condemned in Brazil for illicit trading. To prove this, the defendant offered a copy of a Portuguese law and of the judgment of condemnation certified by the American Consul at Para to be true copies of the original. Marshall, *C. J.*, said: "In this case the edicts produced are not verified by an oath. The Consul has not sworn; he has only certified that they are truly copied from the originals. To give to this certificate the force of testimony, it would be necessary to show that this was one of the consular functions, to which, to use its own language, the laws of this country attach full faith and credit. *Consuls, it is said, are officers known to the law of nations, and are entrusted with high powers. This is very true,* but they do not appear to be entrusted with the powers of authenticating the laws of foreign nations. They are not keepers of those laws" (p. 236).

And in Coppell *v.* Hall, 7 Wallace, 542, 553, this Court took judicial notice of the status and general functions of the plaintiff as British Consul at New Orleans.

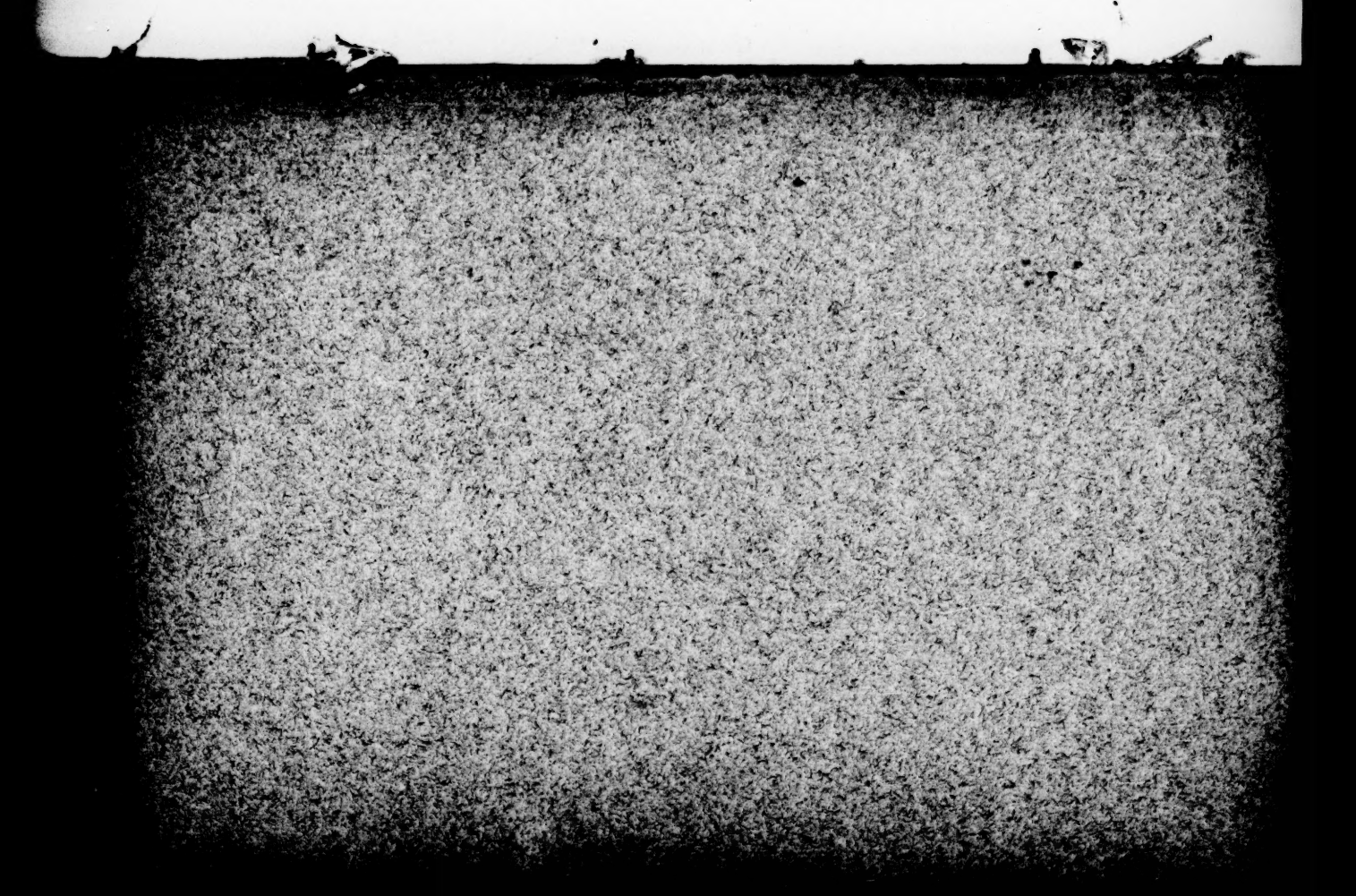
Inasmuch as the plaintiff's opening disclosed the fact that he was the Consul-General of the Ottoman Empire, and as the general nature of the duties which consuls owe to the governments of which they are the commercial representatives are matters of which courts are bound to take judicial notice, it follows that the learned Court below committed no error in holding that these duties were inconsistent with the receipt of commissions from a contractor with his Government, and that consequently the plaintiff could not recover upon the agreement in suit.

V.

The judgment of the Circuit Court for the Southern District of New York should be affirmed, with costs.

ARTHUR G. SEDGWICK,
EDMUND RANDOLPH ROBINSON,
of Counsel.

ROBINSON & SCRIBNER,
Attys. for Deft.



OFFICE SUPREME COURT U.S.
FILED
APR 5 1961
JAMES H. McKENNEY, Clerk

Supreme Court United States.

CHRISTOPHER OSCANYAN,
Plaintiff in Error,

vs.

THE WINCHESTER REPEATING ARMS COMPANY,
Defendant in Error.

Plaintiff in Error in Reply.

First.—To Principal Brief of Defendant in Error.

POINT I.

On the Question of Practice.

On page fifth they claim that the United States Courts are only bound to adopt the practice of the State Courts in Common Law cases in an approximate way, under the words "as near as may be" in the Statute 17 U. S. 197, § 5.

This language cannot be held to allow the Federal Courts to reject rules, which are perfectly easy of application, but refers only to those cases where the adoption of State rules would be substantially impracticable. Any other rule would defeat the beneficent purposes of the act, which were to produce certainty and uniformity in practice, as between the Federal and State Courts. The object of the law was to adopt the statutory procedure in the States where it does not conflict with the legislation of Congress upon that class of subjects and for that reason does not extend to evidence. *Connecticut Mut. Life Ins.*

Co., v. *Schaefer*, 94 U. S., 457. It does, however, extend to pleading. *Bennett* v. *Maryland Fire Co.*, 17 Alb. Law Journal 363.

The case of *Newcomb* v. *Wood*, 97 U. S., 581, rests upon special grounds. It was a case for a motion new trial, which has for ages been held to be a matter of discretion in Courts of Common Law jurisdiction, and *indispensable* to the correct administration of justice before tribunals acting with juries. This is quite a different matter from a rule of pleading, which depends upon positive law. What was said on this subject in the case cited, was not really necessary to the decision of the cause. The plaintiff in error, however, does not object to it.

On page 6, the defendants say, that the Circuit Court "*permitted*" an amendment. This is not correct. There was no amendment. Moreover, under the State practice, there can be no amendment allowed where the answer is silent as to the subject matter of the defence.

Brazil v. *Isham*, 12 N. Y., 9
Wright v. *Delafield*, 25 N. Y., 266.

On pages 6 and 7 they strive to show from a quotation from *Coppell* vs. *Hall*, 7 Wallace, 542, that the element of illegality is of such a vicious character as *to subvert the rules of pleading*. The Court had no such intent in the remarks there made. The case had been tried; the facts, disclosing the illegality, had been *set up in the answer*. The claim of the plaintiff was, that *assuming* his cause of action to be tainted with illegality, a claim by the defendant in the nature of a counter-claim, was a waiver of it. It was to this suggestion that the remarks of the Court were directed.

The counsel for the defendants in error then proceed to urge upon a mere question of pleading, that this is a claim, as completely *contra bonos mores*, as a contract for prostitution, and that, therefore, it is unnecessary to set up illegality as a *defence*.

If it were true that the contract is *contra bonos mores*, their suggestion is a *non-sequitur*, for there is no reason why such a fact should not be set up in the answer, as will be seen hereafter. The claim itself, however, is unsound. Careful writers do not confound the cases, where a contract concerns a matter of ordinary morality with those which are governed by rules of public policy. They would

deem it absurd and irrational to assimilate this case to one of prostitution. Thus, Chitty in his work on Contracts 11th Am. Edition, 979, divides contracts, which are illegal at common law into two classes; those which are immoral and those which are contrary to public policy. Among the first he places such cases as prostitution, and in the second such instances as the sale of offices and the like, p. 990, Pollock on Contracts, 242-3. This view is utterly opposed to the theory of the defendants. Having participated in the fruits of this contract, why should the defendants seek to clothe themselves with a superfluous garment of infamy?

The defendants also maintain a distinction on the same ground between what is *malum prohibitum* and *malum in se*. In the one case they admit that a failure to set up the illegality is a waiver, but insist that it is not in the other. This old distinction between the two forms of *malum* has, however, long been exploded in every form in which it may present itself.

Aubert vs. *Maze*, 2 Bos. and Pull., 375.
Lewis vs. *Welsh*, 14 N. H., 296.
Note of Mr. Christian to 1 *Blackstone Comm.*, 58.
Bank of the U. S. vs. *Owens*, 2 *Peters*, 536, 539.

The vice of the argument of the counsel for the defendant is, that it confounds a question of pleading with a discussion of the merits of the case, when properly pleaded.

The true principle is, that every contract, having in it the elements of parties, consideration, assent and subject matter, is presumptively valid. It lies with a party, who questions its validity on *any* ground, not involving these points, to set these up in a *pleading* in the nature of an answer, and they must be proved at the trial. It is still the rule, that one must recover *secundum allegata*, as well as *probata*. The logic of the whole subject is briefly this: Before the point of *illegality* can be raised, it must be conceded, that there is a *true contract*, which would be enforcible, if not illegal. It is plain, if there is no contract at all, there cannot be an *illegal* contract. From the nature of the case, illegality must be "new matter" or matter "by way of confession and avoidance."

The defendant's illustration at the bottom of page 7 is halting. We

do not claim that it is necessary for them to *aver that the contract was contra bonos mores*. What we say is that the *nature of the services* which they affirm to be illegal must be averred by them, and from these the *Court* will determine whether they are void for illegality.

The theory of the existing New York practice is much considered in *McKyring* v. *Bull*, 16 N.Y.,297, 303, where it is finally said: "In England, as we have seen, after centuries of experience, it has been found most conducive to justice to require the parties virtually to apprize each other of *the precise grounds upon which they intend to rely;* and the system of pleading, prescribed by the code, appears to have been conceived in the same spirit." The modern English cases hold, that any illegality in the contract must be pleaded by the defendant, even though such illegality *appear on the plaintiffs' pleadings or by the plaintiffs' own evidence*. *Fenwick* v. *Laycock*, 1 Gale & Davison, 27, 1 Ad & Ellis N. S., 414; 5 Jur. 459. In another leading case the proposition is established, that illegality of the consideration of a contract cannot be objected to, unless specially pleaded. *Clutterbuck* v. *Coffin*, 3 M. & G. 842; 6 Jurist, 131; Car. & Marsh. 273. *Martin* v. *Smith*, 1 Bing. N. C., 544. A defendant cannot under the general issue set up the illegality of a wager as an answer to an action to recover the amount, *Potts* v. *Sparrow*, 1 Bing. N. C., 594. These cases were decided under the rule of Court Hilary term, 4 Wm. IV., which requires matter by way of confession to be specially pleaded. One of these cases was illegality by statute and the other at common law. In *Bradshaw* v. *Hayward*, 1 Carrington v. Marshman, 591, the very illustration presented itself, to which defendant's counsel have alluded at the close of page 7 of their argument. To defeat an action for wages, the defendant offered evidence to show that the plaintiff was his mistress, under the plea of *non-assumpsit*. The Court said: "if the object was to show that there was *no* contract it would be admissible, but if there was a contract, though founded on a corrupt consideration, it was matter by way of avoidance and must be specially pleaded." Mr. Pomeroy in his work on Remedies under the Codes of the several States gives this as the *consensus* of them all: "The rule is well settled in strict accordance with the true theory of pleadings under the codes that *all* defences based upon the asserted illegality of the contract in suit which admit the fact of a transaction between the parties purporting to be an agreement and apparently binding, but which insist that by reason of some violation of law, the same is illegal and void,

are new matter and must be set up in the answer." Citing examples, § 708.

This rule requiring plain and straightforward statements in the pleadings by way of defence, is peculiarly applicable to illegality, even in Courts of Equity. There are some strong words on this subject from a High Court in the case of *Haigh* v. *Kaye*, L. R. 7 Ch. Appeals (A.D. 1872), 469, 473. JAMES *L. J.* of Appeal, says on p. 473: "the defendant suggests by way of answer, first of all vaguely and faintly, that this transaction was not altogether a straightforward transaction; that this transaction was entered into with a view to defraud somebody else. The defendant says in effect, 'I am to remain in possession of the estate, because we were both of us engaged in a transaction contrary to the law, and you will not take it away from me to give it to a man, who was as bad as I was in the matter; in fact it was an illegal and fraudulent transaction against somebody else, and where there is an equal crime, the Court ought to hold that *in pari delicto, melior est conditio defendentis.*' *However, the defendant has not raised that defence in the way in which, according to my judgment, such a defence ought to be raised.* If a defendant means to say, that he claims to hold property given to him for an immoral purpose, in violation of all honor and honesty, he must say so in *plain terms* and must clearly put forward his own scoundrelism, if he means to reap the benefit of it." Justice Mellish concurred.

The counsel for the plaintiff would not have ventured in the present case to characterise the conduct of the defendants as being "in violation of all honor and honesty," and an act of scoundrelism, had they not the high authority of Justices James and Mellish.

POINT II.

As to the merits of the case.

The learned counsel for the defendant seems to have fallen into various errors and misapprehensions, both as to matters of fact and as to rules of law, which he assumes to have been laid down in adjudged cases; and these errors might embarrass the Court, if allowed to pass without correction.

I.

Aside from the questions of practice the real question for this Court to decide in the case at bar, will, in the end, be found to be only this:

"Would the contract between plaintiff and defendant have been "illegal, even if plaintiff had been a private individual and not offi- "cially connected with the contracting government as its consul or "otherwise."

That this is the real question, seems to be virtually conceded by the counsel for the defendants.

See his brief, page 18, *Point IV.*

The fact that plaintiff was authorized to take the honorary title of Consul General for Turkey, and even to collect Consular fees from Turkish ships, if such should ever enter the port of New York, is wholly immaterial in this contention because,

First. As consul, he had by general usage recognized among consuls, the right to engage in commerce as commission merchant or agent.

Second. In this particular instance, he had special permission from the sovereign authority in Turkey to enter into the contract in question, and to receive commissions on the sale of the arms of defendant.

A.

The status of consuls in the middle ages is an enquiry, interesting no doubt to the student of history, but scarcely profitable in this contention.

It is enough for us to know, that in this nineteenth century consular officers have such powers and duties as their appointing governments may please to attach to the office, and the governments to whose territory they may be sent, may not object to.

These powers as far as consuls appointed by the United States are concerned, now include, with certain special and statutory exceptions, full permission to the consuls to engage in commerce in the foreign ports to which they may be sent, and to sell there their own goods or the

goods of any one else on commissions, the payment of which would be contingent on the effecting of the sales.

1 Kent, Com. 44.

And as matter of fact it is known to all business men, that not only our consuls, but consuls of various foreign governments in the United States are often bankers, and merchants and brokers, and get their living by said occupations.

In the case of France, it is otherwise.

French Consuls are by special enactments of French law, prohibited under severe penalties from carrying on commercial business of any kind in any port where their consular functions are to be performed.

1 Kent, Com., p. 44. Beawes Lex Mercatoria, Vol. 2, pp. 416-420, Pardessus, 4 Tom., 14.

We may assume then in the absence of any proof to the contrary, that the same powers which are generally accorded by the United States to their consuls, and by the other foreign powers except France, are also accorded by the Turkish Government to their consuls in foreign ports, as for instance, in the Port of New York.

B.

We are, however, not left in doubt on that subject, inasmuch as the Turkish Government did, *in this instance*, accord to the plaintiff outside of, or in addition to the general consular powers, special permission to act as commission broker and to enter into this contract with the defendants, to act as their agent and broker, in bringing the attention of Rustem Bey, the Turkish agent in this port, to their arms, and to receive from the defendants commissions for such service, in case such arms were ultimately purchased by the Turkish Government.

See Record of this case, p. 13, fol. 40.

By the permission of the Turkish Government, the plaintiff acted in

this case not as *their* agent, but as the agent and broker of the defendant.

Fol. 67, p. 22.

Furthermore, the Turkish Government knew that he acted as such broker for a commission to be paid him by the defendants, and they permitted and encouraged plaintiff to take such commission.

Fol. 40, p. 13.

All this was equally well known to the Turkish agent in New York, Rustem Bey.

Fol. 46, p. 15.

It is very clear therefore, that plaintiff did not in this transaction represent the Turkish Government, or act or profess to act in its behalf; that he was not under any duty or obligation towards that government, as its consul or otherwise, but that he was openly and professedly, and with full knowledge of that government, and its special agent in New York, acting as the agent and broker of the defendants, who were endeavoring to effect a sale of arms to that government.

C.

Thus, the plaintiff in entering into the contract in question or in acting thereunder, as the broker of the defendant, for a commission contingent on sales, did no act inconsistent or conflicting with consular duties, nor was such contract a fraud on the Turkish government or on the Turkish people, as the learned counsel for the defendant in his brief, repeatedly asserts.

Neither did the contract in question involve a sale of plaintiff's official influence as officer of the Turkish government.

The Turkish agent in New York, Rustem Bey, knew that plaintiff was not acting in this transaction as Turkish Consul, or as agent in any manner of the Turkish Government, but, on the contrary, that he was acting as agent and broker of the defendants.

The influence of the plaintiff, therefore, could not have been the influence of a Turkish Consul, but only such as might fairly be used by a New York merchant or a New York agent or broker employed by New York merchants, desirous to sell their wares to the Turkish Government at the best price.

The Turkish agent in New York, Rustem Bey, had full notice and warning of the attitude of the plaintiff, and could not have been influenced by the fact that plaintiff had the merely honorary office of Turkish Consul General, and it must not be forgotten that plaintiff was only Consul General in name. There was no salary attached to the office, no work to be done. Turkish ships never enter the port of New York. Turkey is not a maritime power. The office was merely honorary and irresponsible, without duties and without emolument (Record, p. 13, fol. 39; p. 22, fol. 66).

D.

The Court will remember that there is no evidence here of any fraud intended or attempted by plaintiff on Rustem Bey or on the Turkish government.

There is in the case no fact from which any such vice can be inferred.

There was no misstatement—no secrecy—no concealment—no influence that bears the suspicion of impropriety, nothing unfair or immoral can be charged against the plaintiff, unless the immorality be found in the fact that he bore the merely honorary title of Turkish Consul, and that his action as broker of defendant might have been inconsistent with some duty attached to the office of Consul or in disobedience of instructions from the Turkish Government.

But the fact is before the Court that the Turkish Government knew and approved of his conduct.

How then can it be argued that his official relations with the Turkish Government rendered his conduct immoral or dishonorable or unlawful?

E.

But the learned counsel for the defence seems to be of opinion that even if the Ottoman Empire had, by express legislation, permitted its

consul to enter into a contract, such as that in question here, the United States would not recognize the right of the Ottoman Empire to give such power to its consul, and the Courts of the United States would not allow such contract to be enforced (see brief of counsel for the defence, page 17). In other words, that the United States will not allow the right of any other nation to give to its own consul any other or greater powers than the United States may think proper to give to its consuls.

Such a claim to arbitrary interference with the rights of other nations over their own officers, is not in accordance with the comity which is due from one friendly nation to another.

As an illustration, France does not permit its consuls to enter into any commercial relations in any port where their consular duties are to be performed, and punishes its consuls with severe penalties if they violate the French law in this respect.

For a violation of this law of France, Victor Place, the French Consul in this port of New York—to whose case counsel for the defence refers in his brief, page 15—was condemned as a felon.

The United States consuls, as we have seen, labor under no such disability, and may buy and bargain and sell like any other merchants, unless in certain ports specially excepted by statute.

Can it be argued that French courts would be justified in refusing to recognize the commercial contracts of American consuls in ports where, by American law, they are free to make such contracts, because such contracts were not permitted by French law to be entered into by French consuls exercising consular functions in American ports?

Would French judges and French lawyers be justified in stigmatizing such contracts made by American consuls as immoral—inherently corrupt—injurious to public welfare, and to be condemned with the same censure and loathing as contracts for the price of prostitution? (See defendant's brief, page 17.)

F.

And while on this branch of the argument, counsel for plaintiff beg leave distinctly to repudiate and deny the statement made in de-

fendants' brief at page 15, Point III, as expressing their views as to this case.

They entertain no such opinions—they make no such concession, they advance no such argument.

They desire that the plaintiffs' conduct, in this transaction, should be tested by a standard of morality, no less high than the highest rule of conduct that may be practicable in the affairs of mankind.

The glosses put upon plaintiff's conduct by defendant's learned counsel in his brief, seem to them unreasonable and unfounded.

They may be permitted here to remark that the labored assumption by the defendants of superior virtue, and the frequent expression of abhorrence, with which they affect to regard this contract on which plaintiff's action is based, and its inherent vice and corruption and flagrant immorality, would have come with better grace, if they had not been participators in the iniquity—if any there were—and even the first to suggest it, if they had not without scruple, received all the profits—pocketed all the gains, and now make parade of the consciousness of their guilt as a cheap and convenient means of evading any contribution to their fellow criminal.

The defence *in pari delicto* is not one which can commend itself to the respect of courts of justice, although they are sometimes compelled to recognize it.

As a defence, it is usually the device of meanness and fraud, and although it may save the purse of the person who resorts to it, it cannot save his character from the well-earned contempt of honorable men.

It is not because of any respect, the law entertains for defendant's attitude, that this defence is entitled to a hearing in a court of justice, but only because the paramount interests of society, and the inability of even the wisest laws to render complete and exact justice, require that a defence so dishonorable should be entertained.

Plaintiff in this case admits no wrong—no impropriety—no infidelity to any duty imposed on him by the Turkish Government.

He made a contract with the defendant in New York, to be executed in New York, to be governed by the laws of New York.

According to the law of New York, as declared by its highest Court,

that contract would have been sustained and his conduct would have been held to be wholly free from blame.

Lyon vs. *Mitchell*, 36 N. Y., 235.

The apparent divergence in opinion on the subject between the Court of Appeals of that State and the Court we have now the honor to address, should, we submit, have suggested caution to defendant's counsel before he ventured to stigmatize as inherently base and immoral, a contract which the highest tribunal in New York would have treated as entitled to respect and enforcement.

G.

But counsel for the defence would seem to contend (see his brief, page 17) that this contract, although not in violation of Turkish law, nor involving any breach of any duty that plaintiff owed to the Turkish government, although in the eyes of that government not *malum in se*, nor *malum prohibitum*, was yet not entitled to protection from our courts of justice, because it was against "public policy."

If the counsel means that the contract was against the "public policy" of Turkey, we answer:

First.—That Turkey, through her authorized officers, consented to the contract and encouraged it, and Turkey must be supposed to know what is against Turkish policy, at least, as well as we can know in the United States.

Second.—That the phrase "public policy" is vague, indefinite and uncertain in meaning and application; that nations differ widely from one another as to what is their best policy; nay, more, that each nation often differs from itself, and regards that as the best "public policy" to-day, which to-morrow it will repudiate and *vice versa*.

For instance, it was deemed good "public policy" for the United States in 1862, through its appropriate department, to allow its broker, Mr. George D. Morgan, of New York, to purchase ships for the government, and take pay for his services in commissions from the sellers of the ships.

At that time, this Republic found itself imperiled by a great civil war, and ships were needed without delay.

Now, it is matter of history that Turkey, in 1870, when this contract was made, was menaced with the war with Russia, which soon afterward broke out.

Her pecuniary resources were scanty; she could not employ paid agents in the foreign countries where arms could best be procured, and yet she was in the utmost need of arms of the most effective kind.

She sent a competent military agent to New York to examine arms, to report upon them, to send samples of them to Turkey for trial, and not being in a position to pay any agent on the spot, she determined to permit and encourage a well-known and well esteemed citizen of New York who had been born in Turkey, and knew the Turkish language, to act as broker for the dealers in arms, and to receive the usual commissions on sales of arms were made.

H.

The Court will notice that Oscanyan had nothing to do with the actual sale of the arms. Rustem Bey had no authority to buy a single gun. The fixing of prices, the bargaining and the purchase and sale were all to be done in Constantinople by Turkish officials vested with that power.

All Rustem Bey could do was to examine the arms, and report and send samples to Constantinople for trial.

All plaintiff could do was to enable Rustem Bey to get sight of the various kinds of arms and examine them, and to explain to him the merits of the arms as to which he had been employed as broker to perform these duties.

Winchester, the defendant, sought an introduction to Oscanyan. He said to Oscanyan, "Will you be kind enough to call the attention of "Rustem Bey to my repeating rifle?" (p. 13, fol. 41).

That is all defendant expected from Oscanyan, and in fact all that Oscanyan could do with Rustem Bey, who had power only to examine the arms, but not to purchase.

Now does it seem against the "public policy" of Turkey, that it should, in its emergency, take these means of getting information as to the arms it needed?

Was it immoral on the part of the Turkish Government to permit and encourage Oscanyan to act as broker for the manufacturers of arms and bring these arms as quickly as possible to the notice of Rustem Bey, by acting as the open and avowed broker of the dealers in arms?

And was it immoral in plaintiff, having received such permission and encouragement, to act as the Turkish government allowed and encouraged him to do?

Where is the difference between his conduct and that of Mr. Morgan?

Was not the "public policy" of the United States in 1862 similar in all important respects to the Turkish "public policy" in 1870?

I.

In truth, there is no rule of "public policy" which nations recognize as binding. "Public policy" is little more than "public opinion." What seems most convenient and expedient at the time is dignified with the name of "Public Policy."

For legislators, indeed, this may be a useful guide, but not for courts of justice.

To follow it, would be to travel by a light ever shifting and uncertain—to leave the rock and seek for safety among the quicksands.

As a learned judge wisely says, in Richardson *v.* Meellish, 2 Bing. 252: "I protest against arguing too strongly upon public policy; it "is a very unruly horse, and when once you get astride it you never "know where it will carry you. It may lead you from the sound "law. It is never argued at all but when other points fail."

Indeed, the variety of opinions among the wisest men as to what is "public policy" cannot have a better illustration than in the fact that the Federal Courts and the Court of Appeals in the State of New York are all supposed to hold different opinions on the subject.

To give to all men the largest power to contract with one another, unless where the purpose and plan of the contract are clearly immoral —this is surely wise and good policy for every State.

To restrict this liberty, because the contract may seem to some men opposed to "public opinion"—calling itself "public policy"—is to sub-

ject law to change with the caprice or passion or selfishness of the unreasoning many.

If a contract is immoral in its purpose or in the means by which that purpose is to be attained—if it is to be carried out with secrecy, concealment, false representation, underhand dealing, corruption, fraud, then it never can be lawful to enforce it.

When it is inherently vicious, no Court will lend itself to sustain it, and the question whether it be against "public policy" or public interest does not arise.

II.

But was it against the "public policy" of the United States that Oscanyon should, with the permission of the Turkish Government, act as broker for the defendants and receive commissions on sales? If the Turkish government assented and approved, where was the wrong, and where was the immorality which it beeame our public policy to censure?

Was it our policy to prevent Oscanyan from bringing the arms of the defendants to the notice of the Turkish Examining agent?

The Turk Rustem Bey spoke no English.

The defendant Winchester spoke no Turkish.

Then Winchester seeks Oscanyan and employs him to call the attention of Rustem Bey specially to his repeating rifle.

Would it have been good policy for a commercial and manufacturing community to stop this channel of communication between a New York seller of arms and a foreign agent instructed to examine arms and report on their advantage?

The question seems to bring with it its own answer. And it is hard to see why the agent of any foreign government coming to this market to examine its wares and report on them to his government should be regarded and treated otherwise than any citizen of the United States or any agent of an ordinary foreign merchant.

He is not the government of the nation which sends him, to make these enquiries. He does not bargain for them or buy for them. He only examines, reports, and sends samples for trial.

For what purpose or for what reason can he claim a closer care from our government, or a greater protection than any other visitor to our market, native or foreign, or why is he to be kept safe from the advances of a New York broker, when one of our own citizens is left exposed to his influence? Put the matter in the strongest possible adverse light; is a foreign government itself buying in our market acting as a government? Does it not by that very act denude itself of its sovereignty and come here simply as an ordinary foreign merchant, comes as a purchaser?

These questions will be no doubt answered in this case.

Having disposed then of the defendant's charge that the contract was illegal, because plaintiff was an honorary consul of Turkey, we return to the question with which we set out.

"Would this contract have been illegal if plaintiff had been a pri-
"vate New York citizen, and had no official relation with the Otto-
"man government."

A similar contract was held good by the New York Court of Appeals.

Lyon vs. Mitchell, 36 *N. Y.*, 235.

III.

Certain dicta can be found in the opinions of judges of the Federal Court, which taken by themselves and apart from the context and without reference to the facts to which the judgment of the Court applied, might countenance the apprehension that there was an irreconcileable difference between these Courts and the New York Court of Appeals on this subject.

A careful examination of these cases will, it is believed, show that the difference is rather apparent than real.

There is not one of the cases decided in the United States Supreme Court to which defendant's counsel refer, as sustaining his views as to the appeal to public policy, that did not exhibit the signs of positive wrong doing—such as secrecy, concealment, false pretences, fraud, the use of improper influences to accomplish improper results.

And probably if these cases had been brought before a New York Court, its judgment on the facts as laid before it, would not have differed from that rendered by this Court, although its decision might be laid on different grounds and expressed in different terms.

IV.

The case of *Tool Co.* vs. *Norris*, 2 Wall 45, was decided in 1864.

Lyon vs. *Mitchell*, 36 N. Y., 235, was decided in 1867 after full consideration of Tool Co. *vs.* Norris.

These cases may be regarded as presenting most sharply the divergent opinions.

In 1864 when Tool Co. *vs.* Norris was decided, the demoralization which always attends a protracted civil war, had reached its climax and the minds of good men were filled with alarm, akin to actual panic.

A statement of the counsel in that case would seem to warrant the suspicion that all the facts which might have weighed upon the Court were not fully set forth in the report of the case.

"With a sense of decorum" counsel says, "the reporter will probably "suppress some of the salient features of this case—the *tacenda* of "the case."

How far this may have been done, we cannot know.

But there is enough in the facts as reported, to warrant the inference that the transaction was in itself immoral and should not have been countenanced.

Norris was an adventurer, without any fixed profession, business or occupation, and seeking in that troubled and exciting time, for any means of making money that might offer.

Finding that the Government wished to buy arms, he applied to the "Providence Tool Co.," who had arms to sell, to give him the job of effecting a sale.

He was not by calling a broker or a merchant, and he does not seem to have held himself out in the transaction as a broker.

The means he adopted to compass the result, were to "*concentrate*

"*influence in the War Department*," to get letters to the Secretary of War from men of *commanding political position*.

He applied to Senator Anthony to go with him and introduce him to the Secretary, which the Senator refused, saying that *it would be discreditable in him to do so*.

The Senator offers to write a note.

Norris says: "I don't want a note—I want the weight of your pres-
"ence with me—*I want to influence the Secretary*."

Does not this evidence show that Norris was a "lobbyist," bent on impressing on the mind of the Secretary, considerations foreign to those by which he should have been moved, and to use upon him an influence dangerous and improper?

Was not the visit he desired Senator Anthony to make with him to the Secretary of War, meant to be a false pretence, leading to the belief that the Senator had some special interest in "Norris" and in the success of his project? Was it not his intention that the visit should be regarded as a virtual *solicitation* on the part of the senator to favor Norris? and was it not the suspicion that such an effect was intended, which induced the Senator to refuse.?

The result was that the employer of Norris got a valuable contract and made a great deal of money out of it (p. 52).

The means adopted by Norris were suspicious, sinister and improper means, and any jury might have inferred from the facts, that the contract intended fraud.

Now take the case of Lyon, executor, *v.* Mitchell, 36 N. Y., 236.

The facts will be found to be wholly different.

George D. Morgan was employed by the United States government to buy ships for them, and they allowed him to take from the sellers a brokerage of 2½ per cent. on the price.

The defendant being owner of steamships, agreed with Stillman to give him ten per cent. on the price of such steamships as he might sell.

He effected a sale to Morgan on behalf of the United States Government, and sued defendant for his commission.

The Court, in a long and well considered opinion, reviews the chief authorities referred to by the counsel for the defendant here, including the case of Tool Co. *vs.* Norris, and says:

"The general rule laid down in these cases is a salutary one. But" "certain other rules and principles are also to be remembered."

"Personal solicitations of the president, the governor, the heads of" "departments, of legislators or judges are not lawful, but a different" "rule prevails where property is offered for sale to the government," "and where a bargain is sought to be made with them, and *where*" "*there is no concealment of the agency.* * * *"

"No fraud on the government is imputed, no suggestion is made of" "pecuniary influence to be used, no intended corruption is suggested."

The contract was held to be valid.

The difference between the facts in these cases is manifest.

In the Tool Co. case, all the facts point to the intent to use illegitimate influence and none other.

In Lyon *vs.* Mitchell, no such inference can be drawn.

Both cases were probably well decided, although somewhat different rules have been extracted from them.

V.

But the case at bar has upon it no features of suspicion.

Oscanyan acted openly towards Rustem Bey as a broker for Winchester.

Rustem Bey knew he was such broker and dealt with him as such and in no other capacity.

The Turkish government knew that he was acting as such broker and permitted and encouraged it.

Oscanyan was a merchant and broker. He had no other means of livelihood.

The Court has decided in Stanton vs. *Embrey*, 93 *U. S.*, 556, that a professional man may prosecute a government contract for a fee contingent on his success.

Why should not a broker, in the performance of his duties, as such, have the same right?

A lawyer in the prosecution of his claim may go wrong and use improper means. So may a broker.

But both, in the honest and legitimate performance of their duty would seem to be entitled to the same rights and the same protection.

In the Lyon *vs.* Mitchell case, Stillman effected a sale to an agent of the U. S. Government for a contingent fee to be paid by the seller.

In the case at bar, there was no thought of effecting a sale through the agency of Oscanyan, through Rustem Bey.

His duty to Winchester was performed when he introduced the defendant's arms to Rustem Bey, and explained their merits.

He used no improper influence on Rustem Bey. He concealed nothing. He misrepresented nothing.

Contrast the facts of the case at bar with those in Norris *vs.* Tool Co. case, and it will be seen there is no similarity between them.

In the Norris case, fraud appears lurking all through. In the case at bar the most censorious Jury could not infer fraud.

Trist *vs.* Child, 21 Wall, 451, cited by defendants, was clearly a case of "lobbying," to obtain from Congress the passage of a private bill.

The contract was void under the act of February 26, 1853, which rendered the assignment of claims against the United States invalid and *that objection of itself was fatal.*

The Court, however, took occasion to condemn the contract as against "public policy."

They might easily have put their condemnation on the ground, that the agreement was corrupt and so illegal.

But their decision of that question was not necessary for the judgment in the case, and their opinion is in a great degree "*obiter.*"

In Meguire *v.* Corwine, 101 U. S., 108, the evidence disclosed the use of secret and underhand means to effect the employment of a lawyer as counsel for the Government.

The contract to carry out this project and share fees, was on its face corrupt and illegal.

This and the other cases cited for the defence will be found to have been each of them tainted with some of the many indicia of fraud. None of these vices appear in the case at bar.

VI.

The question presented to this Court then is only this:

Is it unlawful for a New York merchant, desirous to sell his wares, to employ a broker to visit the agent of a foreign government who desires to examine and inspect such wares, and to display and commend the wares to such agent, it being known to the foreign agent that such broker is acting as the broker of the New York merchant?

If that be unlawful, the sooner it is known the better, for the existence of such a rule is wholly unknown to commercial men, and it cannot but exercise an unfavorable and wholly unexpected influence on their business.

They have been used to regard the agents of foreign governments so visiting the New York markets, in the same light as any other buyers, and have believed that they might use the same means to press their wares on their attention and present to them the same inducements to buy.

Will it be henceforth laid down as law that they must not employ brokers in their dealings with such agent—or which amounts to the same thing—that they must pay these brokers no commissions.

In case of this foreign agent not speaking English, or any language with which the New York merchant is familiar, must the merchant beware of employing any broker or go-between who can address the foreign agent in his own tongue?

Would the fact that the broker had been an acquaintance of the foreign agent, and for some reason had secured his good will and friendship, be a disqualification, and should one be selected for broker whom the agent did not know and did not respect?

This question must be determined in this case.

VII.

The plaintiff claims that his conduct has been free from secrecy, concealment, improper influence, false pretense, and fraud of any kind, direct or constructive, that he had the right to act as broker for Winchester the defendant, that as such broker he had the right to exhibit Winchester arms to the special agent of Turkey in New York, and to commend these wares and to induce said Turkish agent to report favorably upon these wares, and to send samples of them to Constantinople for trial.

VIII.

The plaintiff acting as the defendant's broker had the right, and it was his duty to use all influence that any broker might properly use, to commend the arms of the defendant to the exclusion of the arms of other manufacturers.

Thus, his efforts to induce Rustem Bey to prefer the Winchester to the Spencer rifle, were natural and proper (Record, page 15, fol. 45).

His effort to induce Rustem Bey to recommend the purchase of 1,000 Winchester arms for the Imperial Body-Guard, was also in accordance with his duty to Winchester whose agent he was.

As the defendant's broker, he had duties to defendant—he was bound to advance its interest—he was bound to earn the commissions which it agreed to pay him.

His only duty to Rustem Bey or to the Turkish Government, was to act toward them with no less truth and fairness than any broker should show to anyone with whom he dealt as broker.

The Court will remember that Rustem Bey had no power to purchase the arms, but only to examine and report as to arms, samples of which were sent to Constantinople, and there tried and tested.

IX!

The character of Oscanyan as described by his counsel in opening, is a material fact in the discussion and should have its due influence.

He was a man of acknowledged intellectual ability, and accomplishments, of well known integrity, a character inconsistent with any presumption of the resort by him to any undue influence or deceit.

See Record, p. 12.

That he intended any wrong or attempted any deceit is not alleged, and cannot be inferred from any fact in this case.

The most that could be charged against him, is that he erred in ignorance of a rule of law, about the existence of which learned Courts are not agreed.

X.

REVIEW OF AUTHORITIES CITED IN DEFENDANT'S BRIEF, NOT ALREADY DISCUSSED.

On page 10 they refer to *Fulton v. Dame*, 18 Pick. 472, as having analogies to the case at bar, and as favorable to their view. That case, however, differs from the present in two most essential particulars. One is that there was a plain trust relation violated, viz., that of a stockholder towards the corporation of which he was a member, the other, that the acts done were not open, but secret and undisclosed (p. 485).

On the same and succeeding page, *Norman v. Cole*, 3 Espinasse, 253, is referred to as establishing the proposition that a person cannot recover who has procured a pardon of a convict. If this means anything more than this, that he cannot recover if unfair and irregular, means are used, it is not sound law. A man may have compensation in such a case, where he has proceeded with openness and fairness. *Chadwick* vs. *Knox*, 31 N. H., (11 Foster). 226; *Norman v. Cole* was cited in this case on p. 228. The particular attention of this court is invited to the reasoning of BELL J.. in delivering the opinion in the New Hampshire case. The reports of Espinasse are notoriously inaccurate, and at best only record opinions given at *Nisi Prius*.

The case of *Brook v. Brook*, cited by defendant's counsel on page 17. is one depending on the construction of an English statute declaring a marriage with a deceased wife's sister void. It depends upon the point that the statute creates a personal disqualification upon an *Englishman*, wherever he may be. That decision might well excite dismay in this country, if it held what the counsel would have it mean that a marriage by an American *in this country*, with his deceased wife's sister, would be held void in England in an action in which the validity of the marriage was involved.

On page 22, *Dainese v. Hale*, 91 U. S. 13 is cited, in an italicised passage, as holding a proposition favorable to the defendant. That point was not, however, in discussion. It was a mere remark, while the general scope of the decision clearly establishes that the laws and usages governing consuls cannot be noticed judicially by the courts.

On page 22 (last paragraph) it is further stated, that in Coppell *vs.* Hall, 7 Wallace, 542, 544, that this Court took judicial notice of the status and general functions of the plaintiff, as British Consul at New Orleans.

This statement is incorrect. The Court, at most, took notice of certain general rules of international law, see page 553.

Counsel for plaintiff beg leave to call the attention of the Court to certain other errors and misapprehensions which have crept into defendant's brief, and are sufficiently important to be specially noted.

Errors of Statement in the Brief of the Counsel for Defendant.

A.

On the subject of the 1,000 guns purchased for the Imperial Guards, counsel for the defence misstakes and mistates the fact as told by plaintiff's counsel in his opening.

Plaintiff's counsel did not say that the purchase was recommended by Rustem Bey, "*not because the arm was a good one, but in order to* "*please Oscanyan, and in order to help him, Oscanyan, to his com-* "*mission*," as the counsel erroneously sets forth in italics in his brief, page 3.

This would naturally lead to the belief that Rustem Bey was more desirous that Oscanyan should get his commissions, than that the Turkish government should get good guns. The passage truly set forth does not bear that meaning. What counsel for plaintiff did say was this:

"Rustem Bey, in order to please Oscanyan, knowing of the fact "that Oscanyan had this arrangement with the defendant, that he "should receive commissions on sales to the Turkish government, "thought he would go so far as to recommend the purchase of 1,000 "for the use of the Imperial Body Guard, who were experienced sol- "diers and veterans."

The meaning of this statement clearly is—not that Rustem Bey recommended these guns "in order to help Oscanyan to his commissions," an inference not derivable from the language used by counsel for the plaintiff; *but that Rustem Bey was well aware that plaintiff was the broker and agent of the defendant, and dealt with him as such.*

That is to say, that although he wished to please Oscanyan, he did not lose sight of the fact that Oscanyan was avowedly acting in the interest, not of the Turkish government, but of Winchester, the defendant

The purpose of this statement was to show that there was no secrecy or concealment about plaintiff's conduct, but that in all his dealings with Rustem Bey, his character as broker of Winchester was thoroughly known and understood.

See also first Brief of plaintiff in error, pp.26, 27.

B.

Victor Place, once French Consul in New York, was not punished by the Courts of France for conduct such as that of the plaintiff in this case, as defendant's counsel erroneously alleges in his brief, page 15.

He was punished because in violation of the statute laws of France prohibiting a French Consul from engaging in any trade, he dealt in arms and sold arms to the French government, and, as it was charged against him, took unfair advantage of the French government in the transaction.

D. S. B.

His case is in all respects utterly unlike the case at bar, and throws no light whatever on this discussion.

C.

The extract from Blackstone in defendant's brief, page 14, is strangely perverted from its original purpose and meaning.

The author is referring to the "*Law of Nature*," and the eloquent sentence relates to that alone.

It has no concern whatever with "Public Policy."

D.

In citing Greenwood *v.* Curtis, 6 Mass., 358, 362, the counsel should have stated that the opinion of Sedgwick J., which he apparently cites as of the Court, was in fact *the opinion of a dissenting judge.* See Brief, p. 16.

E.

Counsel states that the introduction of Rustem Bey to Winchester was by the plaintiff. *Defendant's brief, page* 2.

This is not true. It nowhere appears that any introduction ever took place between Winchester and Rustem Bey. The only introduction mentioned in this case was of Winchester to Oscanyan, which took place at the request of the former without any solicitation on the part of the latter. Record, fols. 9, 41.

Thus far in answer to the original brief of the defendants in error.

Second, IN REPLY TO DEFENDANTS' SUPPLEMENTAL BRIEF.

I.

It only remains to reply to some extraordinary statements of a heated nature made in their supplementary brief. This brief shows, in the most convincing way, the great dangers to the administration of justice of the mode of proceeding adopted at the Circuit.

It is filled with assertions of fact not to be found in the record, of which this Court is asked to take notice on the statement of counsel. Among other things, this Court is to take notice of the fact, that one of the plaintiffs' counsel has been a judge of the highest Court of the State of New York!!

As, however, the defendants' counsel refers to facts which he asserts occurred at the trial, but not on the record, we propose to follow him.

The fact was, that when the junior counsel commenced his opening address to the jury, the defendant had a stenographer, *employed by himself solely*, taking notes. Not a word was intimated to the counsel for the plaintiff of the object of the stenographer's attendance, and they were at a loss to determine.

After the opening was delivered from *brief pencil memoranda* of plaintiff's counsel, the motion to direct a verdict was made from *this stenographer's notes.*

The senior counsel now deliberately, and in the most formal manner, reiterate the statement that they had not consulted with their client so as to be informed of the facts, but took them from this opening speech. The pressure sustained in the preparation of the case is shown by the record. Mr. Shook was substituted attorney on December 11. 1877. (fol. 13), and the opening address was made by him on December 13, of the same year (fol 35). He thus had but two days for his entire preparation, which covered many facts and was necessarily volumnious.

The statement (page 1, Sup. Brief), that plaintiff's counsel made no objection to the Court's entertaining the motion, is untrue. On the other hand, in the strongest possible terms, they insisted that the Court had no jurisdiction either under the United States or State practice. This is shown clearly enough by Judge Shipman's opinion at folios 29, 30, 31, on both branches of the subject. But suppose they made no objection. What difference does that make? This is a question of jurisdiction. It is a novel idea in jurisprudence that a judge can successfully usurp jurisdiction over a subject because counsel fail to animadvert upon the usurpation.

The counsel for the plaintiff reluctantly say that the proceedings of the defendants at the trial disclosed a covert and concealed plan to dispose of their client's rights by a sort of snap judg-

ment, scarcely consistent with the high moral tone assumed in their argument on the main question. It may well be that a Court proceeding on high grounds of public policy should more decidedly criticize such conduct in one of its own officers than they would the innocently intended acts of an honorary official of a foreign and semi-barbarous government. To the first part of the final paragraph on page 4, it is a sufficient answer to suggest, that the record does not show any such statement as the defendant *italicizes*. Nor is any such fact in the memory of the plaintiff's counsel.

The counsel for defendant say, on page 4 of their supplementary brief, that the motion was "founded on *matter of defence*. That matter of defence appeared otherwise than by the opening. It appeared in *evidence* by an express admission, united in by the whole body of the plaintiff's counsel."

We brand this as a most disingenuous and untrue statement. The implication is that the counsel for the plaintiff intended the opening as a *substitute* for evidence. On the other hand, the fact was, that when the motion to direct a verdict was made, they vehemently claimed a right to introduce evidence on their client's behalf.

We, however, most cordially agree with the counsel, that all this subject was "*matter of defence.*" Will this Court assume that we all intended to betray the cause of our client by unnecessarily admitting "matter of evidence" which might turn out to prejudice his case in the eye of the Circuit Judge?

This case is not the same as (see page 5 Sup. Brief) if the defendant had pleaded a release, and on that a question had arisen as to the admissibility of evidence.

This is not a question of *evidence*, or a *ruling upon evidence*. It is a question of JURISDICTION, which has been decided over and over again by the Federal Courts. See pages 5 to 10 of plaintiff's original brief.

The real question is, will this Court, in view of all the possible and probable mischiefs of such practice discard an unbroken series of precedents and assume a *jurisdiction* which it has heretofore deliberately rejected.

The cases referred to on page 9 of their brief *do not touch this*

question of jurisdiction. They concern the effect of stipulations deliberately made as *substitutes* for evidence, and having in them the element of estoppel. (See the Cases).

All that is said from pages 10–13 (Supplemental Brief) is irrelevant. It does not touch the question of the jurisdiction of the Court. They are cases where *the plaintiff's evidence is all in* and where the Court *had* jurisdiction under the practice, as established in the State where the question arose. This whole point we fully discussed in our original brief (pp. 6, 7, 8).

Even if the defendant could show a case of authority from a high State Court dismissing a plaintiff's case for matter of defense stated in his opening (and this we believe he cannot do), but if this could be done, the case would be of no avail, for the United States Circuit Court by the law which gives it vitality and judicial force has *not the power* to dismiss a cause till the evidence is in regularly, as shown by the cases cited by us on page 6, as well as by the strong and perfectly decisive case of *Silsbey* v. *Foote*, 14 Howard, U. S. 220.

And all this for what purpose? To carry out a fantastical idea of this defendant that this contract is *in its own nature* so vile, so shamelessly corrupt, as to make the ears of all men tingle when they hear it mentioned in connection with the full and marked approbation of the government whose policy, if any, is affected. Under cover of the diversion thus made, the defendant hopes to pocket, freely and without disturbance from courts of justice, his enormous gains. Such tender-mouthed, wry-faced, self-regarding fastidiousness has but one salutary effect—to produce wholesome laughter from observers.

If, however, we give our friend credit for perfect sincerity, we have here an extraordinary instance of morbidly conscientious verbosity—a true redundancy of semi-religious expressions. Our friend, when engaged in moral discussions, resembles the cuttlefish—he conceals himself under a shower of ink.

To sum up briefly this whole matter: The defendant is in this dilemma: This case is governed either by the practice in the United States courts, or in the courts of New York. If governed by the United States practice, there is no jurisdiction to dismiss a case on the opening; if governed by State practice, the defence of illegality is not available, because it was not set up in the answer.

II.

The defendant, in Point II. (page 13, Supplementary Brief) cites the case of *McKee* vs. *Cheney*, 52 Howard's Pr., 147, as favoring his construction of the New York Code, that the defence of illegality need not be set up in the answer.

There are several answers to this contention.

1. This is a special term case, and of no importance if at all in conconflict with the decisions of the Court of Appeals cited in plaintiff's original brief on pages 11 and 12. This court is governed by the construction placed on codes by the decisions of the highest State courts.

2. The facts in that case did not resemble the case at bar. There were allegations in the answer which could, under the construction given them, let in the defence of illegality. Here the general issue only was pleaded. Even then, the judge had "grave doubts." He, however, allowed an amendment on the construction he gave to the answer.

3. On the merits of the case, the opinion of the judge adopted the distinction for which the plaintiff contends, found in such cases as *Lyon* vs. *Mitchell*, cited in the original Brief, pages 20–1.

It is a singular fact that throughout the defendant's whole discussion he is driven to sustain his tottering argument by the slender and unsubstantial flying buttress of reported and unreported cases at *Nisi Prius* and special term and dissenting opinions in other cases. (See *Norman* vs. *Cole*, page 10, original Brief; *Greenwood* vs. *Curtis*, opinion of Sedgwick, *J.*, page 16; *McKee* vs. *Cheney*, sup. Brief, page 13; *DeLinton Wing* vs. *Tonawanda Herald*, id. pages 17-18.

If he were allowed further reply we might reasonably anticipate a still further descent to the decisions of Cattaraugus county court and Canandaigua justices of the peace.

III.

In his Point III. the defendants' counsel groups, in categorical form, the various subjects from which he professes to derive his theory of the "non-enforcibility of the contract" in suit.

Counsel for Oscanyan will follow this plan of inquiry and as briefly as possible answer the questions which defendants' counsel only suggests.

A.

"*The relations of Oscanyan and defendants to each other.*"

Oscanyan was agent for defendants, in bringing the arms of the defendants to the attention of Rustem Bey, who was the special agent of the Turkish Government, sent out by it to the city of New York, to examine and report as to the purchase of arms. Record, fol. 38.

The service which defendant requested of Oscanyan was, "that he should call the attention of Rustem Bey to defendants' repeating-rifle" (fol. 41).

That was the service and "favor" defendants asked of Oscanyan. The Court will see that it was an important favor, for in no way and through no other person but Oscanyan, could defendants lay their arms before Rustem Bey, and explain their merits.

For that "favor" defendants agreed to pay Oscanyan a commission (fol. 50).

This is the only "favor" he promised to give.

The duty of Oscanyan to the defendants, as their agent, was simply to inform Rustem Bey that defendants' arms were for sale, to bring defendants and Rustem Bey together—to call Rustem Bey's attention to the arms, and to favor the sale of these arms in preference to the arms of other dealers by whom Oscanyan was not employed.

It is stated in the opening that he did give that "*favor*" to other manufacturers of arms (fols. 39, 40).

In a word, all the duty that any agent owes to his employer, Oscanyan owed to the defendants.

These and these only were the relations between defendants and Oscanyan.

B.

"*The subject matter of Oscanyan's contract, regardless of his relations to the Turkish Government,*" was only this.

Oscanyan contracted to present defendants arms to the attention of Rustem Bey, to say to him all that could be truly said in commendation of them—to bring the defendants and Rustem Bey together, so that each could know what the others wished to do and would do—and to help them to negotiate by interpreting between them.

The defendants, on the other hand, were to pay to Oscanyan for this service, commission on sales, if such ultimately took place.

The actual sale could only be effected by defendants themselves, directly with the Sultan himself; with that, Oscanyan had nothing to do.

Oscanyan had nothing to do with fixing the prices at which the arms were to be sold. It was no part of his duty to defendants to bargain as to the sale—and he did not bargain or interfere as to the prices.

All that was done by the defendants themselves.

The trial judge was misled on this subject.

He speaks more than once in his opinion of Rustem Bey as the "*purchasing agent of the Turkish Government* (fol. 17, 25)."

There is nothing in the case to warrant this statement.

Rustem Bey was not a purchasing agent. He was sent here only to *examine arms, and report as to their merits and send samples of them to Turkey* (fol. 38).

He did nothing more, and was not empowered to do anything more.

The actual purchase of arms was the act of the Sultan himself, (fol. 43–75.)

The contract, in its terms, does not provide or call for any service from Oscanyan, other than that above stated. The conversation between Oscanyan and Winchester does not suggest any other service.

There is nothing in the case to warrant, even the suspicion, that any other services were intended or expected. There is nothing to show that any other service was given.

C.

"*The relations of Oscanyan to Rustem Bey*" were those of old companions and friends, both native-born Turks—both speaking the Turkish language—meeting here in New York, where the Turkish language is spoken by very few, and naturally drawn into renewed association.

As to the transactions between Rustem Bey and defendants, Oscanyan was the avowed agent of the defendants, disclosing his character as such agent to Rustem Bey (fol. 11), and recognized by Rustem Bey as such, and recognized by the Turkish Government as such. There was no official relation whatever between Rustem Bey and Oscanyan.

There is nothing before the Court to prove or to lead to the inference that Oscanyan had any other relations with or used any influence on Rustem Bey other than such as flowed out of these friendly relations.

The trial judge was misled when he said in his opinion that Oscanyan was "the manager of the business transactions of Rustem Bey with American manufactures" (fol. 24).

There is nothing whatever in the case to justify such a statement.

Oscanyan, it may be presumed, interpreted for Rustem Bey—it is not so stated, but it is probable—but that he had any control of Rustem Bey's business, or managed his transactions nowhere appears. If it be alleged, or insinuated, that the relations between these gentlemen were corrupt, we answer that such charge or insinuation is without foundation or excuse. There is nothing, in the case, to sustain it.

Where the act which is subject of a contract may be lawful or unlawful, according to the circumstances, it will not be presumed that it was unlawful. The contrary is the proper inference.

"Broom's Legal Maxims," p. 582.

D.

As to the "*relations of Oscanyan towards the Turkish Government as to this contract*," there were no relations whatever.

In these transactions Oscanyan was not the agent of the Turkish Government but the avowed agent of the defendant.

No relations whatever existed between him and the Turkish Government as to these arms, except that he was known by them to be the agent of the Winchester Arms Company (fol. 67).

The honorary office, or title conferred on Oscanyan, required no service and was productive of no compensation to him. He therefore engaged in mercantile enterprise with the consent and encouragement of the Turkish Government (fol. 65), and used his abilities as best he could to get a living.

That Government gave him special permission and encouragement to act for the defendant as their broker, not indeed for negotiating a sale, but for presenting their arms to Rustem Bey.

The trial Judge was misled when he said in his opinion, that Oscanyan was the "officer and trusted adviser of the Turkish Government," (fol. 24.)

There is evidence that in this transaction he was *not* in any proper sense an officer of the Turkish Government.

There is not a tittle of evidence that he was in the transaction or in any other, "*their trusted adviser*" or that they ever asked either advice, or any other service from him.

The trial Judge errs, when he says that Oscanyan was *in some sort the representative of the Turkish Government in this city—New York—and an acknowledged official of the empire.* Fol. 17.

The expression is vague. But there is no evidence that Oscanyan was *in any sort* the representative of the Turkish Government in New York, or that he ever did represent them in any thing.

It was a title of honor, an "honorary office" without any compensation from the Turkish Government and without any duties. (fol. 39.)

Yet the counsel for the defence assumes all through his appeal to the Court that there was some necessary inherent inconsistency between the functions of Oscanyan, as honorary "Consul General," and the duties he assumed toward defendant. A man can surely hold some kinds of office under a government, and perform all his duties, and yet sell to that government and receive the price of what he sells. For instance, a Notary Public is an officer of the State of New York; can not he contract with the State—sell to the State—act as broker between the State and one of its citizens?

But, if there had been any such inconsistency here, it was removed by the special permission and encouragement of the Turkish Government that Oscanyan should act for the defendant and take the commissions.

And even apart from that special permission, there is no evidence that Oscanyan had any functions attached to the title of "Consul General," or if he had any functions, that they antagonized his duty to the defendants under the contract

There are no functions fixed and necessarily attached to the office of Consul General.

Every nation may prescribe to its own consuls the extent and nature of their official duties.

Appleton's Encyclopedia, vol. 5, p. 640, title—Consuls.

Thus, the relations of the Turkish Government towards Oscanyan, if any, are not disclosed in the case, unless in this, that they did not in any way prohibit his entering into the contract in question.

E.

"*The place of making the contract*"—the City and County of New York—there the contract was made; there it was to be executed. By the laws of that State, plaintiff claimed to recover in this action. His action was commenced in the Supreme Court of that State, and thence removed by the defendants into this Court (Record, fol. 4).

If this action were tried in the Court in which it was first brought, plaintiff is advised by his counsel that he could not have failed to recover.

F.

"*The assumed legality of the contract tried by the standard of Turkish law and usage.*

There should be no doubt about that, assuming that Turkish law and usage are in accordance with right, reason, and the rules of morality understood by civilized men. If Oscanyan is to be regarded as an

American citizen, acting as broker for an American dealer in arms, it is hard to see why he should not act as such broker towards a Turkish agent, sent to New York to examine or even to purchase arms there, in the same way as he might act towards any one else visiting the city of New York with a like intent.

Rustem Bey visited New York as an ordinary person, not claiming that he was the Turkish Government, or represented it, or seeking or entitled to any protection or immunity on that account.

Why Oscanyan should not make a contract such as that in suit—and why that contract should be held invalid in Turkish Courts—if such a forum could have been selected—is not clear to ordinary comprehension.

The contract in Turkey would be, of course, legal, because no Turkish law made it illegal, and because the Turkish law giver—the Sultan—declared that it was not illegal and gave special permission that it should be made, and encouraged the plaintiff to make it.

G.

But there is here no question of Turkish Courts or of their action.

The question is whether the contract not being inconsistent with any functions attached to this barren title of "Consul General," not being in violation of Turkish law, and besides being in accordance with the express permission and encouragement of the Turkish Government, and not being on any other account corrupt or immoral, should not be held free from any illegality or suspicion of illegality in any courts anywhere.

Treating the contract as counsel for the defendant desires it to be treated, "regardless of the relations of Oscanyan to the Turkish Government," what is it in the worst aspect it is capable of, but a contract between an American manufacturer and his agent, that the agent should use all fair means to induce the agent of a foreign corporation to examine and report in favor of the purchase of his employer's wares?

In such transaction, what other or better position does a foreign government hold than a foreign corporation.

If the United States were to send a special agent to Glasgow to examine and report as to the purchase of steamships, lying in the Clyde, would it be held illegal in English Courts, for the sellers of such ships to employ some middleman, to deal between them and the agent from the United States?

The effort of counsel for the defence has been all through his argument to confuse and misrepresent this case, and it is, perhaps, not strange that the trial Judge Shipman should have been misled, in the haste and excitement of a trial, involving so largely the interests of a corporation as well known as the defendants, not only in Connecticut, but all over the United States.

If this contract were invalid, it could only be because of one of two defects.

(1) Because the purpose of the contract was illegal, immoral, corrupt.

(2) Or because the means to be used to attain that purpose were illegal, immoral and corrupt.

The purpose of the Winchester Arms Company in this contract was, to have their arms shown to the Turkish inspecting agent and favorably presented to his notice.

There was no vice, or illegality, or immorality in that.

The means they adopted was the employment of the most suitable person to act on their behalf. For that purpose, Winchester selected the only man in New York perhaps, who could talk to the Turkish agent in the language he understood best—and who had, from old acquaintance, a natural and proper influence over him.

This influence, and no more, was called for by the contract.

There is no evidence that any other influence was expected or attempted.

These means were not illegal, or immoral, or corrupt.

Neither in its purpose, nor in the means adopted to accomplish it, was this contract open to any such charge.

IV.

This Point of plaintiff's brief is chiefly occupied in an ingenious play on the two words, "influence" and "favor," mixed with errors and misrepresentations.

The word "influence" of itself expresses nothing wrong, immoral or corrupt. It may be good influence or it may be bad influence, according to its nature, the source from which it proceeds, and the purpose for which it is used.

There is scarce a moment in man's waking life in which he is not "influencing" some one.

The lawyer influences the Court or the jury by his argument--the judge influences the jury by his charge--the witness influences the jury by his testimony--the friend influences his friend by advice or persuasion--the merchant or the broker influences the customer to buy.

These influences are all legitimate, customary, and well understood by all business men.

The customer knows and is prepared for the influence of the merchant or broker.

He knows that the merchant asks as high a price as he thinks it for his interest to ask; the buyer opposes that influence, by resolving to give no more than it is his interest to give.

Now, what did Oscanyan contract to do for Winchester other than any reputable agent is expected to do and ordinarily does for his employer?

Defendants' counsel says that he contracted with defendants for the "*sale of his favor and influence.*"

Where is the evidence of such a contract? The written instrument does not show it; the conversations with Winchester do not show it.

What *influence* did Oscanyan promise to use—what *favor* did he promise to show, other than such as any ordinary agent agrees to give in favor of his employer?

Is there any evidence that he used any other influence?

From the beginning to the end of the plaintiff's opening there is

not one fact stated nor one word spoken that can support such a conclusion or inference.

Defendants' counsel talks of the exercise of "that favor and influence in the betrayal of the people of the nation of which Oscanyan was an officer, and was the chief representative in the United States."

That he was not the chief commercial representative of Turkey in the United States we have shown.

That he was not an officer of that Government in this transaction we have shown—that the honorary office he held required of him the fulfillment of no duty which conflicted with his duty to the defendants under the contract—that he was specially permitted to enter into the contract by the Turkish Government we have shown.

How were the interests of the Turkish people betrayed by him or by anyone else in this transaction?

Were not the defendants' arms good arms?

Were they sold at an exorbitant price?

Was there any fraud in the bargains and sale of these arms by defendants to the Sultan?

Was anything concerning it misrepresented by them?

Nothing of the kind was done by Oscanyan or by Rustem Bey.

If indeed defendant themselves were guilty of fraud towards the Turkish Government, that is their shame.

The plaintiff's hands are clean.

But the phrase, "betrayal of the interests of the Turkish people," &c., if applied to Oscanyan, means, if it means anything, that he betrayed Turkish interests *confided to his charge*.

We have shown that no Turkish interests were confided to his charge—but, on the contrary, he was expressly permitted by the Turkish Government to represent the interest of the defendant.

Defendants maintain that Oscanyan's influence was corrupt (1) because it was personal influence arising from friendship and (2) Because it was *official* influence.

Defendant offers in proof the extract from the opening which he copies in italics on his page 15.

The influence was corrupt, he says, because *defendant knew*

1. That there were intimate relations between Oscanyan and Rustem Bey.

2. That Oscanyan's influence was great with Rustem Bey.

3. That having associated officially with him here and elsewhere, Oscanyan and he had been boys together, and that consequently, Oscanyan and Rustem Bey *had influence with each other*, &c.

Now, the fact that *defendant knew all* these things, is no proof that Oscanyan agreed to use this influence for any *immoral* purpose or in any *immoral* way.

Defendant knew that "*Oscanyan and Rustem Bey had influence with each other.*"

This does not lead to the inference that Oscanyan could influence Rustem Bey more than Rustem Bey could influence Oscanyan.

When defendant Winchester sought and had an introduction to Oscanyan in the store of Hartley & Graham, the request he made of Oscanyan, was this:

"Will you be kind enough to call the attention of Rustem Bey to my repeating rifle?"

Oscanyan says: I am receiving commissions from all parties *for that favor.*

Here the word *favor* comes in on which defendant's counsel builds his charge of corruption.

The "favor" was to call the attention of Rustem Bey to the Winchester arms, as he had done in the case of other arms of other manufacturers.

Again, in page 16, defendants' counsel says that Rustem Bey was *the purchasing agent;* this important error, in fact, is reiterated to this Court as it was first stated to the misleading of the Court below.

The influence of Oscanyan was not used to the result stated by defendants' counsel, in his page 17.

The words, "*not because the arm was a good one,*" in his sentence, do not occur in the record.

These words are ingeniously interpolated in the sentence.

The transaction was this: Oscanyan, acting for defendants, found that they were about to lose their chance of selling their guns, because certain Spencer guns, belonging to the United States, were for sale, and he exerted himself to induce Rustem Bey to prefer the Winchester guns rather than those of another pattern, which the United States Government had to sell, and to recommend the Winchester guns for trial.

If he had the right to act for the defendants at all, he had the right to do this.

That he had such right, we have shown. That the Winchester arms commended by plaintiff were good arms, defendant will not deny. By their aid, the Turkish army held Russian forces, superior in numbers, repeatedly at bay. There is no evidence whether the Spencer guns were good or bad.

The cases cited by the defendants' counsel in his supplemental brief are none of them in point.

They are all cases in which either the purposes to be accomplished were bad, or the means to attain were bad and immoral.

Pease *vs.* Walsh, 29 N. Y., Superior Court 514, was decided at Special Term, 1875.

The plaintiff agreed to get from the dock commissioners a lease of certain docks in the City of New York for the White Star Line of steamships, by the use of his influence with some member of the Board and was to get $15,200 if he succeeded.

Plaintiff was not a lawyer, broker or agent—his action was secret and underhand.

On these accounts, the Court held the contract unlawful.

Develin vs. *Brady*; 32 Barb, 519, was an action on a promissory note of $3,000 given to a person in consideration of his agreement to use influence with the Street Commissioners of the City of New York to induce him to make a favorable settlement of certain claims against the city—*the allowance of which could not be obtained without such influence.*

Here the purpose was clearly illegal and immoral.

It was tampering with a *quasi* judicial officer as to his *decision.*

The case of De Linton Wing *vs.* Tonawanda Herald must pass without notice, until an authenticated account of the case can be procured. Plaintiff's counsel would prefer not to be bound by the report of the case given in defendant's brief. It is merely a Circuit case.

None of the other cases are in point.

They were, some of them, cases of "lobbying" members of legislature or directors of public corporations.

In Brook *vs.* Brook, cited in defendant's Supplemental Brief, pp. 24, 25, the House of Lords refused to acknowledge the validity of an Englishman's marriage with the sister of his deceased wife, because it was against the policy of England, by the terms of an express statute.

Hope *vs.* Hope—an agreement between husband and wife that she should facilitate a divorce—a clear effort to defeat the ends of justice.

De Brimont *vs.* Pennyman. The learned judge said the recognition of the contract worked a direct violation of the policy of our laws.

We deny that the contract of Oscanyan to act as agent for the defendants worked any violation of the policy of our laws, or of any laws.

Groll *vs.* Levy was a case of champertous contract for collection of a debt due in England.

The Court held that, though made in France, it was in violation of English law.

We have no objection to the decision.

It does not touch the case at bar, if the contract was, as we submit it was, perfectly blameless as tested by the laws of New York.

So with Watson *vs.* Murray—a lottery partnership case—a clear violation of statute law in England.

The counsel for the defendants, after examination of plaintiff's brief, still, with strange tenacity persists, in the misapprehension of our line of argument.

We do not say this contract was good, according to Turkish law, and therefore it must be good in New York.

We say that the contract was made in New York, and tried by New York law it is a valid contract; a contract usual and ordinary among merchants, and wholly blameless, unless it in some way violated Turkish law.

The Turkish Government having set Oscanyan free from all official obligations in the transaction, and permitted him to act as agent for all American manufacturers who might employ him, and there being nothing in Turkish law against it, the contract was relieved of all question and is valid in New York, and not open to any other or greater objection than would exist if any New York citizen, other than Oscanyan, had made the contract.

The learned counsel for defendant ventures to call the commission which defendants contracted to pay to Oscanyan, "a bribe."

The same vile epithet might with no less propriety be applied to all commissions received by all agents, and, perhaps, to all fees received by all physicians, and even all lawyers.

The learned counsel does not rely on any supposed relation of Oscanyan to the Turkish government as invalidating the contract. It only adds, in his opinion, an *additional element of turpitude*, (Brief, p. 23) which also seems to have been the opinion of the Court, (Record, folio 28.) That is to say, the contracts of all agents are stained by inherent *turpitude*.

The fact of their happening to be consuls would only make the iniquity of their conduct a little more nefarious.

It would serve no good end to follow the windings of this contention through all its "vicious circle."

The counsel for the defence claims that the government of Turkey was not at the date of the contract, March, 1870, an absolute despotism.

It was then, surely, an absolute monarchy.

In the Statesman's Year Book, 1871, Turkey, to which the counsel refers, we read:—"The will of the Sultan is absolute in so far as it is not in opposition to the Koran."

This difference between the learned counsel and us is a merely historical question, and is of no moment.

But his error again illustrates the unhappy tendency to go wrong

as to matters of fact, which has been his besetting sin in this contention.

The passage from Lord Lansdowne's speech in December, 1788, on the Regency question, is eloquent, but it is not easy to see how it is apposite to this discussion.

The crowned heads of Europe seem at this moment to be in a position to appreciate the bitterness of the saying that "kings and queens have no rights."

But what all that has to do with a contract made by a New York agent with a Connecticut manufacturer to exhibit his wares to the examining agent of a foreign corporation—a foreign government—does not appear.

Through the greater portion of this supplemental brief misrepresentation is substituted for facts, and assumptions take the place of argument.

Such as it is defendant's syllogism is substantially as follows:

Major Premiss:—It is inherently corrupt for a consul to transact business with his own government receiving any personal advantage.

Minor Premiss:—Oscanyan is a Consul General of Turkey.

Conclusion:—Therefore it is inherently corrupt for Oscanyan to act as agent for defendant, in presenting and exhibiting its arms to an inspecting agent of Turkey.

This is the sum and substance of the entire argument when divested of its billingsgate.

To this we answer: *First.*—Oscanyan's office, at best, was an honorary one, without compensation from his government. *Second.*—If any duties attached to it, they were in no way incompatible nor inconsistent with his relation to defendant as its agent in this transaction, and *Third.*—That he acted as such agent with the full knowledge, permission and encouragement of his own government.

Defendants' counsel then replies: such a contract of agency would be contrary to the public policy of the United States Government.

We rejoin, that precisely such a contract in the case of George D. Morgan was permitted by this Government, which the United States Senate, by an overwhelming majority, refused to condemn, and that

the identical contract was adjudicated to be valid by the Court of Appeals in the State of New York.

Defendant's counsel then falls back upon the authority of the *Tool Company Case.*

We again answer, "that that case goes upon the ground that the agreements, which defendant's counsel claims it condemns, are opposed to our system of government—of divisions of powers of department," but that such doctrines are not applicable to a country like Turkey, where no such division of powers prevails, but where all power is centered in an absolute monarch—the Sultan. We then institute an analogy between the power centred in the Sultan and the power of the people of the United States as embodied and expressed in the Constitution, and ask the question, "suppose the people of the United States, by a clause in the constitution, had sanctioned the method of procuring contracts through a broker, would the Court then say that, what the nation had ordained, was contrary to public policy?"

How does the defendant's counsel meet this?

He admits it; and by admitting it, admits that the judgment of the Court below was error.

On page 34, supplemental brief, he says, "It might be so within the jurisdiction where such constitution is the supreme law."

Was not the permission given to Oscanyan within the jurisdiction of the Sultan, and is not the will of the Sultan the supreme law of Turkey?

The defendant's counsel thinks he is extricating himself from the difficulty when he says, on the same page, (34), "But if it were so, it would be because a constitutional provision expresses the *will of the people when acting in their sovereign capacity*?

But does not the irade of the Sultan express the will of Turkey acting in its sovereign capacity?

We contend that, under the treaties between the United States and the Ottoman Empire, the Sublime Porte—the Sultan—may establish consuls in this country, and may prescribe their duties, and may give them permission to transact business extraneous to their duties as consuls; that the Sultan, under these treaties, had the right to permit Oscanyan to act as the agent of the defendant in this action; and that

the contract in suit is not in contravention of the public policy of this country, as it in no way interferes with, or affects its business operations.

V.

The defendant in Point V. does not give an accurate statement of the language used by counsel in the opening.

Counsel said:

The business between the manufacturers and Rustem Bey were transacted through the plaintiff—and all of these parties, with the exception of defendant, have paid Oscanyan commissions for his services, which commissions he was permitted and encouraged to take, by the Turkish Government and by authorized agents (*fol.* 41.)

It is very clear that he was authorized to take commissions from all the manufacturers including the defendant.

The defendant plainly labors with the difficulties in his case growing out of the permission and encouragement of the Turkish Government to the plaintiff to take these commissions.

He endeavors to befog this branch of the case by the discussion of a totally irrelevant question, arguing at great length to show that the turpitude of contracts depends on the law of the *forum*, instead of the law of the place of the contract (*lex loci contractus*). Should the court at any time adopt this view, it may lead to some very pernicious results, which we will not stop to discuss. It is certainly opposed to many very important decisions, such as *Kentucky v. Bassford*, 6 Hill, 526. and the opinions of text writers of authority. The case must be *extreme*, to take such a view. It must be such a contract as the common sense of mankind treats with loathing, such as a contract for prostitution.

That is, however, not this case. There is no foreign contract here in question. It is a New York contract, bearing upon administrative affairs in Turkey. It is attacked because opposed to public policy in Turkey. The question of public policy cannot come up at all unless you concede that Turkey is a State having governmental powers, and so having a public policy. Before this court can reach this question,

it must settle upon two things: one that Turkey is a state, and the other that *it* can have a public policy. If these do not exist, then no influence can be exercised adverse to any duty. Now, then, shall not Turkey determine what its public policy shall be? The defendant says no. It shall have no policy but United States policy. If it makes a contract, it shall resort to no agencies except such as we think most judicious. We thus apply a much harsher rule to Turkey than we do to ourselves. We can ratify contracts made by brokers for the government, we can by suitable means eliminate the element of illegality, but Turkey cannot, Turkey shall not.

In this point the attention of the Court is respectfully called to the case of *People* v. *Stephens*, 71 N. Y. 527, 536, 537. On that case there was a contract confessedly illegal and contrary to the public policy of the State of New York. The contract acted directly against the State, as this is assumed to do. But the public authorities having full knowledge of all the facts and receiving a benefit from the contract, it was held that the State was bound and could no longer maintain that the contract was illegal. The State through its authorized agent could waive all questions relating *to the origin of the contracts*, p. 536. The opinion of ALLEN, J., p. 560, deals still more fully with the power of State officers to dispose of questions of this kind. If such waiver can be made after the contract is entered into, by parity of reasoning it can be sanctioned in advance, with full knowledge of all the facts by the proper authority. The question then narrows itself down to this, *did Turkey sanction this contract for commissions?* The opening says it did, and that, for the purposes of this case, with the most favorable interpretation for the plaintiff (see *Stackers* vs. *N. Y. Central*, 79 N. Y., 468), must be taken as true.

The counsel for the defendants also, under this head, lays great stress upon the matter of frauds, as illustrated by the case of *Maguire* vs. *Corwine*, and other cases. There is no question but that all frauds should be suppressed and discountenanced.

Counsel for the plaintiff fully concur with the defendant's counsel in his general objection to *frauds*.

They would probably go further in the application of the term in this case than defendant's counsel would desire.

Violent and exaggerated condemnation of *fraud* by the defendant

Winchester is quite consistent with his character, as exhibited in this case.

It may be well for counsel on the part of his client, Winchester, to take this opportunity of expressing his contrition for his share in the iniquity—of which he is conscious—in this case.

It seems unnecessary, however, to aggravate his offence by holding it out to equal abhorrence, as if he had bought or sold a human being, or purchased the chastity of a woman, or the pardon of a criminal, or the decision of a judge, or the consent of a woman in marriage.

His crime in the eyes of his counsel may be of this standard of enormity. As far as his guilty intention is concerned, Winchester must be himself the best and indeed the only judge.

But his guilty intention that Oscanyan should exercise undue influence, does not make Oscanyan a partner in such guilt.

Oscanyan did not promise nor agree to use undue influence—and there is no evidence that he ever did use it.

We challenge the defendant's counsel to point out any undue influence used by Oscanyan.

Counsel's only substitute for argument is reckless assertion—exaggerated epithets—but no proof.

VI.

The plaintiff's counsel do not think it necessary to discuss this point in the defendant's Supplemental Brief, as it is covered by the suggestions made under Points of this reply (III., IV. and V).

VII.

In the VII. Point of this Supplemental Brief, the defendant makes the absurd statement, that the contract is with O. F. Winchester, *in-*

dividually (see fol. 50 of Record). He fails to state to the Court that the contract is signed O. F. Winchester, "*Pres. W. R. Arms Co.*" This description is of no importance, it seems, when used by the defendant, though its address to the plaintiff, as "Ottoman Consul General," is duly magnified and dwelt upon. The contract shows a manifest intention to bind the defendant company. This is enough (1 Parsons on Contracts, Book 3, Section 4, and cases cited).

Even if it were not so, the plaintiff could have offered oral evidence at the trial to show that the company was liable. *Higgins* vs. *Senior*, 8 Meeson & Welsby, 834; *Coleman* vs. *Nat. Bk.*, 53 N. Y., 393; *Briggs* vs. *Partridge*, 64 N. Y., 363, and cases cited.

Moreover, the defendant company accepted the benefit of the plaintiff's services with knowledge of them, through the knowledge of their president, and will be deemed to have ratified the act of Winchester. The contract was made for its benefit by him and accepted by supplying the arms accordingly (*Bolton* vs. *Hillusden*, 1 Ld. Raym, 224; 1 Pars. on Contracts, Book 1, Chap. 3, § 3; *Mowry* vs. *Rosendale*, 74 N. Y., 360.

In such cases as these, every reasonable intendment must be made in the plaintiff's favor (*Stackus* vs. *N. Y. Central*, 79 N. Y., 464, 468.

Besides, the defendant cannot raise this question as the record shows (folios 22, 64, 69), that no part of the opening is included in it, except what was necessary to present the question of illegality and the question of practice.

Conclusion.

In closing this discussion counsel for the plaintiff respectfully but earnestly beg leave to call the attention of the Court once again to the exceeding hardship of this case.

It is seldom in the liberal administration of our laws that an inadvertence or mistake—an error committed from insufficient preparation—from haste—from misapprehension—from other causes which involve no wrong done to the Court, are left wholly without remedy.

If the plaintiff's case, as presented in his complaint, does not set

forth a cause of action, and the Court so holds on demurrer, it always—with one exception—gives him leave to amend.

If a judge errs on the trial of a cause, and the Appellate Court so holds, a new trial is ordered.

The suitor is not condemned for the error, either of the counsel or of the Court. He only suffers from delay.

Here the attorney was called into the case two days before trial.

He retained counsel, who had not time to possess themselves of either the facts or the law of the case before it came on for trial.

Their prayer to the Court for a postponement was most rigidly refused. The case was driven on. The attorney for the plaintiff in his opening told all he knew of the case--presented the little he knew of the facts, with such inferences and comments as occurred to him.

Under such circumstances, in a speech of four hours' length, it will not be surprising if some unguarded and immature expressions are found.

The associate counsel listened, unable to say whether or no the facts were truly or completely stated, and hoping that the evidence as it presented itself would give them more light.

A motion was made to dismiss the action on the opening of counsel for the plaintiff, and it was promptly decided by the Court against the plaintiff—decided on the instant, without any opportunity of reading over the opening for correction and revision—and plaintiff was left without any remedy, unless he can find it in the justice of this Court.

At the close of the argument the Trial Judge produced and read his written opinion—written evidently before the close of the discussion, and under the pressure of haste and insufficient acquaintance with the facts as stated by counsel.

We ask a new trial. We ask that plaintiff's evidence be received.

We ask a "*verdict on evidence*"—if that evidence be insufficient to sustain our action—let the verdict be against us.

To deny us this right seems a denial of justice, and it becomes Courts of Justice to be not only just and righteous, but to be even above the suspicion of permitting wrong.

If defendant's defence is good, it cannot fail to succeed on the evidence before a jury.

But if plaintiff be driven out of Court without the opportunity to

prove his case as it really is, he loses not only his suit, but leaves Court with a grievous stain on a reputation which he had hoped to carry pure and unsullied to his grave.

Then every offensive epithet of defendants' counsel would receive full point and poison, and the plaintiff would go forth as a base "betrayer of the land of his birth"—"as a violator of the great moral law"—as a "bribe-taker"—a wretch guilty of turpitude, such as that of the villain who contracts for the sale of a human being, or for a share in the "wages of prostitution."

We ask this Court not to deny to this man an opportunity of showing by evidence, that these charges are untrue.

A new trial should be ordered.

Respectfully submitted,

RICHARD O'GORMAN,
THEODORE W. DWIGHT,
Senior Counsel for Plaintiff in Error.

HERMON H. SHOOK,
Junior Counsel.

OFFICE SUPREME COURT U.S.
FILED
MAR 25 1881
JAMES H. McKENNEY, Clerk

UNITED STATES SUPREME COURT,

October Term, 1881.

CHRISTOPHER OSCANYAN,
Plaintiff in Error,

vs.

THE WINCHESTER REPEATING ARMS CO.,
Defendant in Error.

Supplemental Brief

For Defendant in Error.

I.—FIRST ERROR ASSIGNED.

On the trial of this case it reached a stage at which the defendant's counsel thought the question was presented whether, without any further development of the facts, he was not entitled to a direction to the jury to render a verdict in his favor.

He accordingly raised that question by motion (fol. 76) for such a direction.

The plaintiff's counsel made no objection to the Court's then entertaining or deciding the motion, but the Court, as if doubtful of the propriety of then so entertaining it, progressed the trial a little further, *by*

asking the plaintiff's counsel collectively if they admitted certain statements, which had previously been made by one of them to the Court and to the jury which had been empanelled to try the cause, to be true?

To this inquiry the plaintiff's counsel (not the youngest and least experienced of them) "*replied in the affirmative.*"

There being this much *evidence* in the case, the Court then entertained and proceeded to decide the motion. The plaintiff's counsel again abstained from objecting to such entertainment. They rose, to no point of order, but only to a discussion of the merits of the case, as appearing by the facts which, by virtue of their express admission, were already in evidence.

They did not ask the privilege of withdrawal of any part of what had been said, nor that of explanation by further evidence. The exception which they took was to the substance and purport of the decision, not to the time of making it.

They now assign as error that the Court entertained and decided the motion.

They are understood to state, by way of argument, in support of the assignment of error, the following propositions, viz.:

1. The present attorney of record, who, in the hearing of his associates, and without dissent from them, (one of them having been a Judge of the highest Court in the State of New York,) had made the statement of facts on which the Court acted, had but insufficient time for preparation, while the older counsel had absolutely none.

2. It is suggested, not in terms but by implica-

tion, that the "expressions" which induced the judgment of the Court were regarded as imperfect, and that they might perhaps have been supplemented or corrected when the evidence was in, and that the plaintiff was "handicapped by the unskilful opening of his counsel."

3. The argument *ab inconvenienti* is resorted to. Among the inconveniences enumerated as likely to arise if the course pursued by the Court below in this instance is sanctioned, are, that "opposing counsel will wrangle over the meaning of loose and unguarded expressions used in the opening, instead of grappling with the real merits of the case"; that "the course pursued tends to multiply appeals;" that "it will be injurious to the administration of justice in the Circuit Courts, because counsel will either refrain from making opening speeches altogether, or be tempted to make statements beyond what the testimony will bear, one of which consequences promotes obscurity, the other disingenuousness," and (most woeful of all) that "this practice, once sanctioned, will tend to withdraw the junior counsel from active participation in trials at the Circuits, and to throw additional burdens upon senior counsel, all to no purpose! It will not be safe to entrust the business of making opening addresses in leading causes except to the most skilful and experienced men. The junior members of the bar will thus be bereft of an important, or rather indispensable, means of professional training."

Thus, according to the contention of the plaintiff in error, the hopes of the junior bar, the ease of the senior bar, the amount of fullness or meagreness of speeches at the Circuit, the veracity of counsel, the

intelligence of the jury, the decision of causes on their merits, the amount of wrangling over loose expressions, all depend on the ruling of this Court upon the present assignment of error.

In comment on this, it may be assumed that this Court will not be seriously affected by such an appalling parade of portentous consequences. It has not in charge the interests or ease of either the senior or the junior bar; it can hardly undertake to repress wrangling, nor discourage flights of fancy at nisi prius, nor to increase the candor, nor diminish the obscurity, of opening speeches.

The real question on the present assignment of error, is whether this case was decided *on a fact which was properly established, and whether that fact went to the merits*

In discussing that question, the real occurrences of the trial must be ascertained, not from the brief of the counsel for the plaintiff in error, but from the record.

That shows no want of preparation, but a superabundance of it. It is rarely that a case is opened with such fulness of detail or such copiousness of extended information.

The difficulty in the case was, not scantiness, but plethora. The motion was not founded on an omission to state something essential to the maintenance of the suit, but *on the deliberate and reiterated statement of a fact supposed to be fatal to the suit, even admitting the complaint, and all the other facts stated in the opening, to be true.* That motion was founded on matter of defence. That matter of defence appeared otherwise than by the opening. It appeared *in evidence* by an express admission, united in by the whole body of the plaintiff's counsel.

This statement shows that the Court acted upon *evidence*, not upon the deficiency of evidence, nor upon hypothesis or assumption.

That the fact went to the merits of the suit is obvious.

The case was the same as if the defendant had pleaded a release, and the plaintiff's counsel had admitted in his opening, and had repeated the admission, in answer to an inquiry, that he had released the cause of action, and as if he then proposed to offer no evidence to impeach the release.

Such a pleading and admission would at once bring the fact to the actual cognizance of the Court, as matter proper for its consideration. It would control the trial; at least it would affect the trial to the extent of calling upon the Court, *ex mero motu*, to say whether proof of the making and breach of the contract would override an unimpeached release, or would have any materiality. Then the present question assumes its final shape, viz.:

If matter of defence, admissible in evidence, becomes apparent to the Court from the opening address of the plaintiff's counsel, and from his deliberate admission in answer to enquiry, may or may not the opposing counsel call upon the Court then and there to rule upon the materiality of any evidence in chief on the part of the plaintiff not affecting that defence?

In support of the affirmative answer to that question, we submit that the arguments—

1. *Ab inconvenienti*;
2. The administration of justice;
3. The education of the junior bar;
4. The ease of the senior bar;
5. The discouragement of appeals;

6. The encouragement of candor;

7. The discouragement of extravagance in openings;

8. The decision of causes on their merits;

9. Economy of time;

10. Simplification and reduction of debate—

are all in our favor, and not against us.

1. It would be excessively inconvenient to be taking proof in support of a state of facts which, if proved, would be avoided by another fact already *indisputably proved* by the express admission and stipulation of counsel in *facie curiæ*.

2. Justice is as well administered by the early determination of a decisive point of law as by postponing its determination in order to receive evidence which must necessarily turn out to be immaterial.

3. The junior bar can be as well educated by the discussion of vital points as by that of immaterial ones.

4. The senior bar will derive more ease and leisure from confining themselves to vital points of law than from sitting as spectators at the taking, or arguing as advocates upon the application, of immaterial proofs; or they will be encouraged to employ their leisure in consulting with their juniors.

5. The determination of the present question in our favor can hardly multiply appeals. It may reduce assignments of error.

6. The power of the Court to entertain such a motion as that in question being once established upon the grounds here contended for, counsel will be encouraged to disclose at once, for the sake of

economy and dispatch, undisputed matter of defence within their knowledge, and which must necessarily come out.

7. Indiscretion and extravagance in promise of proof will be repressed by the certainty that *matter of defence often repeated and deliberately admitted* will be seized upon and availed of promptly by the Court and opposing counsel. There will be a happy medium between the gloomy reserve and the gushing loquacity which answer for Scylla and Charybdis in the brief of the learned counsel for the plaintiff in error.

8. }
9. } These advantages are obvious.
10. }

Finally, it is submitted that the Court below simply applied to peculiar circumstances the principle upon which the State Courts have always acted in nonsuiting a plaintiff, and the Federal Courts in directing a verdict for the defendant. That principle is, that the plaintiff has no right to divide or try to divide a jury where undisputed facts, decisive of the controversy, appear in proof, or where he totally fails to give competent evidence of some fact essential to his case. The Court below did not stretch the principle in applying it as it did.

The power to nonsuit, under the practice in most of the State Courts, or to direct a verdict, under the practice in the Federal Courts, results simply from the principle that the Court is the Judge of the law where there is no dispute about the facts.

As Judge B. R. Curtis says in the extract quoted by the learned counsel for the plaintiff in error (p. 8), although it is not the practice of the Federal Courts

to grant a motion for a nonsuit (as is the practice in the courts of nearly all the States), they may direct a verdict for the defendant. The difference between the practice in the two cases is a matter of form, "a difference in the mode of proceeding," because the only case in which the Judge is authorized to order a verdict for the defendant is the same when he would order a nonsuit.

Orleans *v.* Platt, 99 U. S., 676.

In this case this Court says: "It is well settled in "the jurisprudence of this Court that *if the facts are* "*clearly established and are undisputed, it is competent* "*for the Court to give such a charge* (to find for plain- "tiff or defendant). In one of the cases brought be- "fore us, where it had been done, the practice was "commended, and it was remarked that 'it gives "the certainty of applied science to the results of "judicial investigation.'" (*Merchants' Bank* v. *The State Bank*, 10 Wall, 604.)

In Pleasants *v.* Fant, 32 Wall, 116, the Court say: "Must the Court go through the idle ceremony in "such a case of submitting to the jury the testimony "on which plaintiff relies, when it is clear to the "judicial mind that if the jury should find a verdict "in favor of plaintiff, that verdict would be set aside "and a new trial had? Such a proposition is ab- "surd." (P. 122.)

So in Appleby *v.* Acton Fire Ins. Co., 54 N. Y., 26, the Court say:

"We think, as an ordinary rule, it may be safely assumed that upon an undisputed state of facts, the Court in which the action is pending may, render the judgment which the law requires, without the aid or

advice of a jury, and that such action does not violate any of the maxims of the law. As much as we venerate and respect the right of trial by jury, we are of the opinion that the judges of the Courts, while they may be supposed to have more learning in the law, are as able to comprehend an undisputed state of facts with as much intelligence as any jury that can ordinarily be empanelled."

In Perley *vs.* Little, 3 Maine, 91, the Court pithily says:

"The provision in the declaration of rights" (securing trial by jury) "is in no way violated or affected by such a proceeding. *There is no privilege in a trial by jury to establish facts which are admitted by all concerned to be true.*"

It is, of course, immaterial whether the admitted facts appear by the uncontradicted evidence of witnesses or the written stipulation of parties or of their counsel, or *by the oral statements of the counsel made in the face of the Court and jury.*

"The statements and representations made to the Court and the complainants on the argument are to be regarded *as a contract* with the Court as well as with the latter; and that it stands on the same footing as any stipulation or engagement made by a party *in facie curiæ* touching the subject matter of the litigation, which the Court is bound to enforce."

Banks *vs.* The American Tract Society, 4 Sand. Ch., 500.

And so it was held in Staples *vs.* Parker, 41 Barb., 650 *that facts orally stipulated in the presence of the Court and jury must conclude the parties.*

And it is familiar practice, both in the State and Federal Courts, that when the plaintiff has established a prima facie case, and the defendant, in his opening, or offers of proof, discloses no defence, for the Court to take no evidence, but to direct a verdict without taking evidence.

People *vs.* Cook, 8 N. Y., 75.
Fort Scott Co. *vs.* Sweeney, 15 Kans, 244.
Hendrick *vs.* Lindsay, 93 U. S., 146.
Bevans *vs.* The United States, 13 Wall., 57.
Whitney *vs.* Brooklyn, 5 Conn., 495.

"Verdicts to an immense amount are daily taken under the direction of the presiding judge in cases where the defence has wholly failed. The jury assent to the direction by giving their verdict. The fact thus found is as conclusive upon the parties as if it had been the result of a long deliberation. Nor is there anything in this practice that impairs the rights of jurors or the efficiency of trial by jury. It does not conflict with the maxims "ad quæstionem facti non respondent judices; ad questionem legis non respondent juratores." To bring a case in hostility to this maxim it must be shown that *a controverted question of fact* was decided by the judge, without the intervention of the jury. *Here was no fact in dispute, and the jury actually gave a verdict.*"

People *vs.* Cook, 8 N. Y., 75.

In Bevans *vs.* The United States, 13 Wall., 57, the defendants, in their opening, offered to prove a state of facts evidence of which the Court refused to receive, being of the opinion that if all the facts which it tended to prove were proved, they would not amount to a defence, and under this ruling, the

defendants having given no evidence whatever, the Circuit Court directed a verdict for the plaintiffs. This direction was sustained as proper by this Court.

If, then, no wrong is done to the defendant in directing a verdict against him upon his opening and in not permitting him to adduce evidence in support of it, when the facts stated by him show no defence, what wrong is done to the plaintiff in directing a verdict against him upon his opening and in not permitting him to adduce evidence in support of it, when the facts stated and admitted by him are fatal to his recovery?

And such seems to be the opinion of this Court.

In Barney *v.* Schneider, 9 Wallace, 251, it is said by Justice Miller, delivering the opinion of the Court:

"The 7th Amendment of the Constitution declares that in suits at law, where the value of the matter in controversy shall exceed $20, the right of trial by jury shall be preserved." * * * * * *

"It is possible to have a jury trial in which the plaintiff, having failed to offer any evidence at all, *or any competent evidence*, the jury find for the defendant for that very reason. And in that case it is strictly correct, if the plaintiff does not take a nonsuit, for the Court to instruct a jury to find for the defendant."

The course which was taken in this case was therefore not only in accordance with the settled practice of the New York Circuit, but in accordance with the views expressed by this Court, and within the spirit and reason of all the authorities upon which the direction of verdicts, whether for the plaintiff or the defendant, has been sustained.

It was also in accordance with the settled practice of the Courts of the State of New York.

Act of Congress of June 1, 1872, 17 Stat., 197, Sec. 5.

Dannat *v.* The Mayor, 66 N. Y., 586.

Kennedy *v.* The Mayor, 73 N. Y., 366.

Stewart *v.* Hamilton, 3 Robertson, 672.

Beckwith *v.* Whalen, 5 Lansing, 376.

Porter *v.* Havens, 37 Barb., 348.

See also, Wright *v.* Bourdon, 50 Vermont, 498.

And Selectmen of Windsor *v.* Jacob, 2 Tyler, 192, which was as follows:

Indebitatus assumpsit for support of a slave alleged to belong to defendant. General issue and joinder. When the case came on for trial, the report says: "The plaintiffs offered to read in evidence to the "jury the bill of sale from *White* to the defendant." Counsel for defendant objected, and after argument, no evidence being given, plaintiffs were nonsuited, on the ground that slavery was in violation of the Constitution of Vermont, and that, therefore, the bill of sale, although valid by the law of the State where made, was void in Vermont.

And also with the practice in England from an early date.

Sadler *v.* Robins, 1 Campb., 253.

Assumpsit on decree of a Jamaica Court. Plea, *general issue.* The decree showed an *unascertained* sum of money due plaintiff. Attorney General having opened, plaintiff was nonsuited, though the Attorney General strenuously urged that the objection was on the record, and that the defendant should move in arrest of judgment. Lord Ellenborough said: "If

"there is evidently no consideration to raise a "promise, so that the action cannot be supported, "why should the defendant be put to move in arrest "of judgment? . . . In many other cases, when it "is clear the action will not lie, although the objec- "tion appears on the record, and might be taken "advantage of by motion in arrest of judgment, or "by writ of error, judges are in the habit of directing "a nonsuit."

See also Norman *v.* Cole, 3 Esp., 253, fully stated in our principal brief, p. 10, in which Lord Eldon, in a case very like the present case, nonsuited the plaintiff on his opening.

II.

The Question of Pleading.

The argument of the plaintiff in error set forth in the second and third branches of his first point that the Circuit Court erred in dismissing the case, because the defence of illegality was not affirmatively set up in the plea is, we think, sufficiently answered in the first point of our principal brief, page 5.

We add merely the case of McKee *vs.* Cheney, 52 Howard's Pr. R., 147, which is directly in point and explicitly in our favor, even under the New York Code. No case in point adverse to this decision is cited on plaintiff's brief.

III.

THE NON-ENFORCIBILITY OF THE CONTRACT, Considered in view of

(*a*) The relations of Oscanyan, and the defendant to each other.

(*b*) The subject-matter of Oscanyan's contract, regardless of his relations to the Turkish Government.

(*c*) The relations of Oscanyan to Rustem Bey.

(*d*) The relations of Oscanyan to the Turkish Government.

(*e*) The place of making the contract.

(*f*) The assumed legality of the contract tried by the standard of Turkish law and usage.

(*g*) The Tribunal in which the contract is sought to be enforced.

IV.

The ideas are advanced in the Second Point of the brief of the plaintiff in error, that the services rendered by the plaintiff were in the nature of, or rest upon the same ethical principles as, *professional* services and were like those referred to in Stanton *vs.* Embrey, 93 U. S., 548, and that they were "free from any taint of fraud, misrepresentation or unfairness," and, further, that if there be any objection to them it rests not upon immutable principles of right and wrong, but upon rules of public policy, "which are purely artificial, changing their complexion with the hue of the sky when they are sought to be enforced."

A sufficient answer to this argument will, we trust, be found in the Statement of Facts at pages 14 and 15 of the Second Point of our principal brief. We respectfully insist that in the conduct of Oscanyan, set forth in the opening, does not bear the remotest resemblance to legitimate professional service; that the two things are separated by no narrow destinction, but by the broadest and plainest line of demarkation; that the facts admitted by the counsel in the Court below admit of no other construction except a contract by the plaintiff for the sale of his "favor and influence," and the subsequent exercise of that favor and influence in the betrayal of the interest of the people of the nation of which he was an officer, and was the chief commercial representative in the United States of America.

The learned counsel for the plaintiff says that the influence which Oscanyan agreed to sell to Mr. Winchester was in the nature of "professional services to advocate just claims," not a corrupt influence, not "that kind of influence which has been justly condemned by courts of justice."

It was, we insist, corrupt because, as is explicitly stated in the opening, it was the *personal* influence arising from friendship and intimacy, and also the *official* influence which one official of a Government has over another official of the same Government, because of their past and present common official relation (fol. 74).

The opening says:

"The defendant in this case *knowing of our intimate relations to Rustem Bey, knowing that other parties approached him through us, knowing that our influence was great with him, and that having associated officially with him here and elsewhere, that we*

had been boys together, and that consequently we had influence with each other, the defendant came to us with a promise that he would compensate us if, through our agency, he succeeded in obtaining the *favor* of Rustem Bey, the authorized agent of the Turkish Government."

The opening refers in various places to Oscanyan's "influence" and "favor," that is, his personal and official influence and favor as being the subject matter of the traffic between himself and the officer of the defendant corporation who made the contract (fols. 41, 51).

The letter in which the promise is made, and the other letters referred to in the case, are addressed to the plaintiff in *his official capacity*.

The opening also states, "Nobody had any *influence* whatever in inducing that sale except the plaintiff."

Therefore, what was bargained for was not legitimate service of any kind, nothing except "favor" and "influence," and especially the particular "influence" and "favor" bargained for was the official influence and favor of one officer, the Consul General, with another officer, the purchasing agent.

It is preposterous to claim that the services were simply "professional services to advocate just claims." In that case the only influence brought to bear upon Rustem Bey would have been the inherent merits of the arm and its adaptability to the use for which it was intended. In the case actually presented, the main influence was the personal favor and friendship of Rustem Bey for the plaintiff, and the natural desire arising from such friendship that the plaintiff should profit by the purchase.

What was actually done by Oscanyan under the

employment, and what his counsel extols him for having done, was the use of his personal and his official influence as Consul-General with Rustem Bey for the benefit of the defendant corporation, with the following result:

(1.) To induce him to recommend the purchase of 1,000 repeating rifles for the Imperial body-guard, not because the arm was a good one, but to please Oscanyan and help him to his commission.

(2.) To induce him to condemn the Spenser gun, not because it was not a good gun, but because if Rustem Bey had approved it the Government would have bought a large stock of these guns directly from the United States and Oscanyan would have lost his commission.

Here are some recent New York cases on the subject of contracts for the sale of such "influence," which were not cited by us on our principal brief:

In Pease *vs.* Walsh, 39 N. Y. Superior Court Reports, 914, it was held, on demurrer, that a contract to compensate the plaintiff for using his "influence" with a member of the Dock Department to obtain a lease of a pier for the White Star Steamship Company, *was contrary to good morals and void.*

See also Devlin *vs.* Brady, 32 Barb., 518, which an agreement to sell "influence" to procure a settlement of a claim by the Street Commissioner of New York.

In De Linton Wing, plaintiff, against the publishers of the *Tonawanda Herald*, tried at Poughkeepsie before Judge Barnard and a jury, March 14, 1881.

The opening statement of plaintiff's counsel and testimony show that defendants, in May 1879, employed plaintiff (a newspaper correspondent and advertising agent, so engaged at Albany for nine years past) to procure for defendant's paper the publication of concurrent resolutions proposing amendments to the constitution; that accordingly plaintiff applied to the proper officer, from whom plaintiff obtained the publication for defendants, who published the same and received therefor $151.87; that plaintiff's application was based on the ground of the intelligent constituency represented by defendant's paper. Plaintiff received the assurance that his application was favorably considered; *and it was made further to appear by plaintiff on the trial that the publication was properly and wisely ordered, and that no improper means were used to obtain it.* The plaintiff offered in evidence the following letter, which was received:

"Office of the *Tonawanda Herald*,
issued every Thursday by
Warren & Chapman,
Editors and Proprietors.

"Tonawanda, N. Y., May 14, 1879.

"Mr. D. L. Wing.

"Dear Sir:—Your very welcome communication received, and now in type; will send you copies as requested.

"In regard to the advertising you spoke of, will be happy to accept your offer at 33⅓ per cent., and hope you may succeed in securing something from the source you spoke off.

"For assistance, if any is needed, you can confidently appeal to Messrs. L. S. Payne & Van Valk-

enburgh (Niagara), and Hurd (Erie), to whom we are personally known, and who are very friendly towards this paper. Hoping to hear from you again soon, we are

"Very respectfully,

"WARREN & CHAPMAN."

Defendant's counsel moved non-suit on the ground that the contract between the parties was against public policy and void. Judge sustained the motion.

It may be well also in this connection to refer to contracts for the sale of "influence" in procuring a marriage which, although valid under the civil law, are held void both in this country and in England, as opposed to "public morals," as they have a tendency to cause matrimony to be contracted on mistaken principles and without the advice of friends, and are therefore relieved against as a general mischief for the sake of the public.

Crawford *v.* Russel, 62 Barb., 99, and cases cited.

V.

The plaintiff in his 5th point states that by the opening it appears that Oscanyan was permitted and encouraged by the Turkish Government to take *these* commissions, and that *therefore* our Courts will give him their aid in their collection, although they would not otherwise do so. This is not an accurate statement of *the fact* averred in the opening, which is (folio 41) that Oscanyan received commissions from *other* manufacturers of arms in payment for his "influence," *which commissions* he was permitted and encouraged to take by the

Turkish Government and by their authorized agents." Even, however, if it be a legitimate inference from this statement that the Turkish Government gave its assent to the receipt by Oscanyan of commissions *for the sale of his influence in this particular case* (which we deny), this assent we respectfully submit does not enable him to collect those commissions in a Court of the United States.

The principle of the cases of Marshall *v.* The Baltimore and Ohio R. R. Co., 16 How., 314; Tool Co. *vs.* Norris, Trist *vs.* Child, and Meguire *vs.* Corwine is, that "influence" to be exercised over a Government official in the obtaining of a contract from him because of his "favor" is not a vendible article under our system of laws and morals, and that the Courts of the United States will not lend their aid to the vendor to collect the price of such an article.

Under these decisions "influence" with the officers of a Government is not a vendible article under our system of laws and morals even when the vendor himself holds no official relation whatever to the Government in question.

In Meguire *vs.* Corwine, Mr. Meguire held no official relation to the United States Government. What he undertook to sell was his "influence" with the Solicitor of the Treasury in obtaining from the Treasury Department the appointment of Mr. Corwine as special counsel. The service rendered consisted simply in urging the appointment upon *the Solicitor of the Treasury* and in inducing him to call the attention of the Secretary of the Treasury to the subject by means of which the appointment of Mr. Corwine was brought about.

This Court again asserts that "influence" of this kind under *our system of morals* is not a legitimate

subject of sale, and that *our Courts* will not collect the price of it.

Listen to the language of stern reprobation which your Honors used on that occasion, and apply it to the present case.

"The law touching contracts, like the one here in question, has been often considered by this Court, and is well settled by our adjudications. It cannot be necessary to go over the same ground again. To do so would be a waste of time. The object of this opinion is rather to vindicate the application of our former rulings to this record than to give them a new support. They do not need it.

FRAUDS of the class to which the one here disclosed belongs are an unmixed evil. Whether forbidden by Statute or condemned by public policy the result is the same. *No legal right can spring from such a source. They are the sappers and miners of the public welfare, and of free government as well.* The latter depends for its vitality upon the virtue and good faith of those for whom it exists, and of those for whom it is administered. Corruption is always the forerunner of despotism.

* * * * * *

The contract is clearly illegal, and this action was brought to enforce it. This conclusion renders it unnecessary to consider the plaintiff's other assignments of error. *The case being fundamentally and fatally defective, he could not recover.*"

In view of this language, it is quite unnecessary to consider the measure, extent or reason of the prohibition of other Courts with respect to the sale of such "influence" as that in question.

It is is evident that, in the view of *this Court*, such "influence" is no more a vendible commodity,

in the sense that the price will be collected by this Court, than a human being or the chastity of a woman or the judgment of a Court or the pardon of a criminal is such a vendible commodity. Such "influence" is no more a vendible commodity than "influence" in procuring the decision of a Judge, or in procuring the consent of a woman to a marriage.

And this "influence" does not become a vendible commodity, so that its purchase price will be collected by a Court of the United States, because the "influence" is to be exercised upon an officer of a Government of a State other than that in which the suit is brought to collect the price.

The States of the Union are foreign to each other, so far as their respective State governments are concerned. Yet it will not be pretended for a moment that a commission to be paid for "influence" in obtaining a contract from the "favor" of the Secretary of State of California could be collected in New York when it could not be collected in California, or even if it could be collected in California.

In Marshall *vs.* the Baltimore & Ohio Railroad Company, Marshall, a citizen of Virginia, sold to the railroad company, a citizen of Maryland, his "influence" in obtaining from the Legislature of Virginia an act for the benefit of the railroad company. The suit to recover the stipulated price was brought in Maryland, but it was not considered material that the "influence" bargained for was "influence" with the officials of a *foreign State*, viz., the State of Virginia.

In Davidson *vs.* Seymour (1 Bosworth, 88) the plaintiff attempted to enforce in a *New York* court a contract for the sale of his "influence" with the

directors of an *Ohio* railroad company to obtain a contract for the construction of the railroad *in Ohio.*

The Court held that a New York court would not enforce the contract. Although it was made to "influence" the directors of an Ohio corporation, it did not deem it material to inquire into the Ohio idea on such subjects. Such a contract being *malum in se,* in the view of a New York court, would not be helped by any foreign assent or approval.

Per *Hoffman,* J.; "There was in it most of the elements of *a vicious* contract, which have avoided similar obligations in the leading cases cited. * * *

There is this difference, that these directors were servants of an organization inferior to that of a State, yet acting in a very spacious sphere, and representing an extensive body of constituents. The distinction between their position and that of legislatures upon a question like this appears to me but shadowy."

Such a contract as the one presented will, therefore, not be enforced in the Courts of one of our States, *whether the "influence" is to be exerted on the officials of its own State or the officials of a foreign State, or on the officials of a foreign corporation.* The reason why the Court refuses to enforce the contract is not, as the learned counsel for the plaintiff in error assume in their third point, because the act done violates the public policy or public morals *of the foreign State,* or is opposed to the interests *of the foreign State,* or is likely to be of injury to the administration of the government *of the foreign State,* but because it violates the morals of

its own State and is of pernicious example to the citizens and injurious to the interests *of its own State.*

A sale of personal "influence," such as was made in the Meguire case and in this case, is an "unmixed evil," whether the influence is to be exercised on an American or a Turkish official. In either case "No legal right can spring from such a source" or be enforced in our Courts. In either case the enforcement would be of evil example to *our* citizens and would sap and mine *our* public welfare and our free government as well. As Comyn puts it: Our Courts refuse to enforce such a contract, because its object *is repugnant to our sense of justice and against the general policy of our common law.*

1 Comyn Contracts, 30.

And therefore our Courts will not enforce any contract, no matter what sanction it may receive from a foreign custom, policy or law, or from a foreign government, or from a foreign tribunal which is in contravention of *our* justice, *our* morality, or *our* policy. See the authorities cited at p. 16 of our principal brief, and the case of Forbes *vs.* Cochrane, 2 B. & C., 448, in which Best, *J.*, says: "The proceedings of our Courts are founded upon *the law of England*, and that law is again founded upon *the law of nature and the law of God. If the right sought to be enforced is inconsistent with either of these, our municipal courts cannot recognize it.*" See also the following authorities:

In Brook *vs.* Brook, 9 H. L. C., 218, the House of Lords refused to recognize the validity of the marriage contract of a man with his deceased wife's sister, made in a foreign country where it was lawful,

as valid in England where it was sought to enforce it, because in the view taken of such a contract by the English Courts it was immoral, and therefore "*the enforcing of it would hold out a bad example to the citizens of the State in which it is to be enforced.*"

In *Hope* v. *Hope*, 8 *De Gex, M. & G.*, 731: An Englishman married a Frenchwoman, and they resided *in France*, where their children were born. Suits were instituted between them in both countries, and were compromised by an agreement of which part was that the wife *would facilitate proceedings for a divorce*, and another part was that one of the children should remain with his mother, and a third part related to the payment of an allowance to the wife, *held that even supposing the parties to be domiciled in France and the agreement to be governed by French law, and to be valid by that law*, and to have been performed as to its parts which were invalid according to English law, it would not be enforced here as to any part of it.

The bill was for specific performance and the defendant demurred.

Counsel for defendant argued: "*It is a sale of a divorce for a pecuniary consideration*" (p. 736).

Turner, *S. J.*, said in deciding the case: "The "question is whether upon the assumption which I "have stated as to the French law being taken into "account, the bill can in other respects be main- "tained. I am of opinion that it cannot, and upon "these grounds: I think that when the Courts of "one country are called upon to enforce contracts "entered into in another country, *the question to be* "*considered is not merely whether the contract sought* "*to be enforced is valid according to the laws of* "*the country in which it was entered into, but whether*

"*it is consistent with the laws and policy of the* "*country in which it is sought to be enforced. A con-* "*tract may be good by the law of another country,* "but if it be in breach, fraud or evasion of the law "of this country, or *contrary to its policy*, the Courts "of this country cannot, as I conceive, be called "upon to enforce it. *Now there are two provisions* "*of this agreement, which, as it seems to me, are con-* "*trary to the law and policy of this country.* "By "Art. 1 of the agreement, one of the children is to "remain under the care of the plaintiff, the mother. "By Art 3 of the agreement, Mrs. Hope, the plain-"tiff undertakes "*not to oppose the suit for a divorce* "*instituted against her by Mr. Hope in the English* "*Courts, but on the contrary, to facilitate the obtaining* "*such divorce.*" "Are these provisions consistent "with our law and policy? * * * * *Then, as* "*to the 3d article.* * * * *What is this article of* "*the agreement? That the wife shall not oppose the* "*husband's suit for a divorce, but on the contrary* "*shall facilitate the obtaining it. I can conceive* "*nothing more contrary to the policy of our law than* "*this provision of the agreement. It is, as it seems to* "*me, repugnant to the law, both as to the object which* "*it has in view and the means by which that object is* "*to be effected.*"

In De Brimont *v.* Penniman, 10 Blatchford, 436. De Brimont, a French citizen, married in France a daughter of Penniman, an American citizen. The wife died, leaving a child. Under the Statute law of France, providing that a father-in-law must make an allowance to a son-in-law who is in need so long as a child of the marriage is living, De Brimont obtained in a French court a judgment against Penni-

man, then residing in France, in an action in which he was served with process and appeared, requiring Penniman to pay him a certain sum in instalments.

De Brimont brought an action of debt on the judgment in the United States Circuit Court.

On demurrer it was held that the suit could not be sustained.

Per Woodruff, *J.*, p. 441: "It would seem that the policy of that country" (France), "as viewed by its Courts, does not require that the son-in-law or other claimant should do anything for his own support, but that he is to be supported in idleness. That is probably not a matter of importance to the present inquiry, except so far as it may tend to show that the judgment or decree is hostile to the policy of this country, and in conflict with the only ground upon which orders arbitrarily imposing upon one the burthen of supporting another would be tolerated. The principle upon which foreign judgments receive any recognition in our Courts is one of comity. It does not require, but rather forbids it, *when such a recognition works a direct violation of the policy of our laws.*"

Under this decision, if Oscanyan had sued his contract in a Turkish Court, and, after appearance and defence made by the defendant corporation, had obtained a judgment against it, our courts would refuse to enforce that judgment.

In Groll *v.* Levy, 16 C. B., N. S., 73, an attorney entered into an agreement in France (where it was legal and valid) with a French subject to sue for a debt due to the latter from a person residing in England, whereby the attorney was to receive by way of compensation a moiety of the amount re-

covered. *Held* that the agreement was void in England and could not be enforced there.

Erle, *C. J.*: "It was clearly an invalid and illegal "agreement. Assuming, therefore, that the agree- "ment was not illegal in the country where it was "made, *it becomes illegal when sought to be enforced "here.*"

In *Watson* v. *Murray*, 8 C. E., Green, 257. Bill by a partner of a lottery firm against copartners for discovery, sale of the property and distribution of the proceeds. The Court refused to entertain the bill.

The Vice-Chancellor said: "Its object is to con- "summate a partnership contract entered into and "continued exclusively for the prosecution of an "illegal and mischievous business. * * Whether "the partnership contract in this case was entered "into by the complainant in this State, where it "would be illegal and void, or in States where it "may have been legal, does not distinctly appear. "It is to be presumed from the pleadings that it "was entered into here. But putting the case in its "best possible shape, and assuming that all the "contracts and transactions involved in it occurred "in States where they where tolerated by law, my "opinion is that this Court will not undertake to "enforce or administer them."

The learned Court then refers to 2 Kent, 457, where the following passage occurs:

"It is, however, a necessary exception to the "universality of the rule (that the *lex loci contractus* "governs) that no people are bound to enforce, or "hold valid in their courts of justice, any contract "which is injurious to their public rights, or *offends*

"*their morals, or contravenes their policy*, or vio-
"lates a public law."

And continues as follows:

"The gambling operations of lotteries are within "these exceptions. They were insisted at the "argument to be *mala prohibita*, and not *mala in* "*se*. I think they are to be taken judicially, if not "abstractly, in ethics, as *mala in se;* bad in their "nature and bad in their results; notoriously preju-"dicial to the interests and the morals of the public. "Their enticing illusiveness is a fraud. They were "described, nearly a century ago, in Adam Smith's "Wealth of Nations. 'The World,' he says, 'neither "ever saw, nor ever will see, a perfectly fair lottery, "or one in which the whole gain compensated the "whole loss: because the undertakers would make "nothing by it. There is not a more certain propo-"sition in mathematics than that the more tickets "you adventure upon, the more likely you are to be "a loser.' But it is wholly superfluous to enlarge on "the pernicious and illegal character of the business "or do more than state it."

If, then, the view presented by us and sustained, as we think, by this array of authorities be a sound view, namely, that the reasons which animate the Courts of the United States in refusing to enforce such a contract as the one at bar for a sale of personal influence over a Government officer, even when made by a person holding no official relation to the Government in question, are considerations of *our* policy, *our* morals, and example to *our* citizens, which considerations *no foreign sanction to the contract of any kind can override*, it necessarily follows that it is entirely immaterial whether the pres-

sent contract was made in New York or Constantinople. Our Courts would refuse to enforce it if it had been made in the Seraglio of the Sultan. It is entirely immaterial whether its enforcement by our Court would or would not violate a rule of *Turkish* policy. It is entirely immaterial whether its enforcement would work injury or benefit *to the Sultan of Turkey*, whom the counsel on the other side *erroneously* assumes to be at the present time the *absolute* ruler of the *people of Turkey*, and to "comprise within himself all powers, whether legislative, executive or judicial" (Appleton's Cyclopedia for 1876, N. S., Vol. I., p. 773). It is also immaterial whether the contract has or has not the "approval of the Sultan." In this point of view, which, we submit, is the true point of view, the contract is like one for the sale of a human being, or the sale of the chastity of a woman, or of a judicial decision, or like a contract for procuring a marriage or facilitating a divorce, which, as fully pointed out in the Third Point of our principal brief and in this point, our Courts and the English Courts refuse to enforce, even though the contract be made in a foreign country, and is there approved by the executive, sanctioned by the Legislature or expressed in the form of a solemn judgment by the Judiciary.

If the Winchester Repeating Arms Company had had a litigation pending before a Turkish tribunal, and the Turkish judge or cadi had made a contract with one of the officers of the company, either in New York or Constantinople, to sell him a favorable judgment for a price, could the judge recover the price in a court of the United States; and would such court help him to recover it even if he produced a

letter from the Sultan authorizing the receipt of the bribe?

Or if the Winchester Repeating Arms Company had a litigation before a Turkish tribunal, and a "friend" of the judge agreed, in New York or Constantinople, to use his "influence" with the judge to secure a favorable decision for a price, could the friend of the judge recover the price in a court of the United States; and would it help the judge's friend to recover it that he produced a letter from the Sultan approving of the acceptance of the bribe?

In the supposed case the bribe is to be paid for "influence" with a judicial officer of a foreign Government. In the present case it was to be paid for "influence" with an executive officer of a foreign Government. Is there any difference in principle between the two cases which should make our court refuse to enforce one contract and undertake to enforce the other?

Would this Court enforce a marriage brokage contract—a contract for the sale of "influence" in procuring a marriage even if made in France and valid by the law of France?

A fortiori, would it enforce such a contract if made in New York, but valid by the law of France, because the lady upon whomthe influence was to be practised resided in France?

If not, upon what ground of principle or authority would it undertake to enforce the present contract?

And, therefore, as the learned judge said below (Record, fol. 28), "Neither do I think it important that the Turkish Government was aware that the plaintiff was in receipt of commissions, for, as has been said, the courts of this country are not organ-

ized to enforce contracts which are repugnant to the principle upon which courts are founded."

The official and representative position which Oscanyan held to the Turkish nation, only adds an *additional* element to the turpitude of the contract.

Even without that element, under the decisions of this Court to which attention has been called, the contract is of pernicious example, and repugnant to our policy and morals, and would not be enforced in our Courts, although it had the assent of the Sultan and of every other branch of the Turkish government. Therefore, even if the assent of the Sultan would, as contended, relieve the contract from the additional element of turpitude derived from the breach of official duty, it would not relieve it from the other elements which make it repugnant to our policy and morals, or enable it to be enforced by our Courts.

But we insist that the assent of the Sultan would not relieve the contract of the additional element of turpitude derived from the breach of official duty. The persons to whom that duty was ultimately due, were the Turkish people The persons to whom the duty of the Sultan and the other members of the Turkish Government was ultimately due were the Turkish people. The cestuis que trustent of Oscanyan and the Sultan, were the same persons. The Government of Turkey was, neither at the time of the contract in question, nor is it at the present time, an absolute despotism.

(Stateman's Year Book, 1871. Turkey.)
Appleton's Annual Cyclopedia, Vol. I, N. S., p. 773 (1876).

But even if the Sultan were an absolute despot he

is,from our point of view—from the point of view of every American citizen, of every American judge who is a lover of his race and a believer in the rights of the people—but *the trustee of power* for the benefit of his subjects. He is the superior and Oscanyan the inferior officer, but both officers, within their scope, are morally responsible to the people of Turkey. It is an immoral proposition, that the. sanction of the superior officer can give validity to the acceptance of a bribe by the inferior officer for a breach of duty to the people of the nation to whom, after all, the ultimate duty of both officers is due. The immorality of the proposition is self-evident when applied to the officers of the government of a constitutional state. We insist that the proposition is immoral, even when applied to a government like that of Turkey, and that, even in that case, when the question arises in our courts nothing can give validity to a contract for a bribe to secure a breach of official duty short of the assent of the entire people which the official represents.

As was said by Lord Landsdowne after he became premier on December 21, 1788, when the regency question was under discussion.

"The principles laid down at the revolution make the crown to be not descendible property, like a pig-sty a lay stall, *but a descendible trust for millions and ages yet unborn.*

"*The people, my lords, have rights—kings and queens have none. The people want neither charters nor precedents to prove their rights, for they are born in every man in every country, and exist in all countries alike, although in some they may have been lost.*"

Lieber's Political Ethics, Vol. 1, chap vi., page 258, section lxxvii.

The learned counsel for the plaintiff asks (p. 24) whether a constitutional provision authorizing an agent of the Government to receive compensation for services and influence from a third person desiring to deal with the government, would not uphold a contract for such a compensation. It might be so within the jurisdiction where such constitution is the supreme law, But if it were so, it would be because a constitutional provision expresses the will of the whole people when acting in their sovereign capacity. It is more than an expression of the will of an agent of the people. It is a direct utterance of those for whom governmental agencies are mere trustees. But in a jurisdiction, where such a constitution is not the supreme law, and where such a provision is repugnant to the policy and laws of the jurisdiction, because intrinsically corrupt and immoral, then it is clear, upon the authorities above quoted, that the Courts of that jurisdiction would presume that they were not created for the purpose of enforcing such a provision, and that they would refuse to enforce it.

VI.

In the view taken by us the contract could not be enforced even if Oscanyan had not been Consul General, and had not been guilty of a breach of official duty to the Turkish people. That circumstance only makes the contract the more infamous, and our position with respect to it the more clear and assured. The argument that this Court will take judicial notice of Oscanyan's official duties and

of their inconsistency with the employment undertaken by him is sufficiently presented in the 4th Point of our principal brief (p. 18).

VII.

The contract set up in the opening is not a contract between Oscanyan and the defendant, but between Oscanyan and *O. F. Winchester individually* (Record, p. 16):

"Oscanyan, Consul Gen.:

"In accordance with *my* promise, *I* now proceed to put in writing the agreement or promise *I* made to you, namely, '*I* hereby promise to pay to you a commission of ten per cent. upon all sales of arms of our company made *to* or by you to the Ottoman Government.'"

The defendant clearly is not liable upon the individual promise of O. F. Winchester, and for this reason also a verdict in its favor was properly directed. If necessary the decision of the Court below should be sustained on this ground, although it was not the ground upon which that Court proceeded.

VIII.

For the reasons set forth in this and in our principal brief, the judgment of the Circuit Court should be affirmed, with costs.

EDMUND RANDOLPH ROBINSON,
Of Counsel for Defendants in Error.